United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

35

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10010

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, ET AL., *Appellants*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

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United States Court of Appeals
for the District of Columbia
Circuit
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Appeal from the Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The appellants and each of them, hereinafter referred to as plaintiffs, appeal from the judgment of the lower court granting motions for summary judgment and motions to dismiss in favor of the appellees, hereinafter referred to as defendants, entered in the United States District Court for the District of Columbia in Civil Action No. 4807-47, on the 19th day of July, 1948.

Jurisdiction for the lower court was based upon the Railway Labor Act (45 U. S. C. sec. 151 et seq) and under Section 24(8) of the Judicial Code (28 U. S. C. Section 41(8). This Court has jurisdiction to review the judgment under the District of Columbia Code, 1940, Title II, Section 101 and the United States Code, Title28, Section 225.

STATEMENT OF THE CASE

This is a suit brought by the plaintiffs and each of them seeking to require the National Mediation Board by mandatory order of the United States District Court for the District of Columbia to set aside and vacate a Determination made by it as of January 31, 1947 resulting in the removing of the individual plaintiffs from under the jurisdiction of the corporate plaintiff and placing the individual plaintiffs under the authority and control of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the International Association of Machinists for collective bargaining purposes; and to require by mandatory injunction the reinstating of an agreement existing between the corporate plaintiff and the Pennsylvania-Central Airlines, named as one of the defendants herein; and to enjoin the aforementioned Brotherhood of Railway and Steamship Clerks, et al., and the International Association of Machinists from exercising any control or jurisdiction over the individual plaintiffs or from attempting to act in any wise as bargaining agents for the said individual plaintiffs.

The plaintiffs' complaint, together with a supporting affidavit, sets forth further that on July 17, 1945, plaintiff union entered into a collective bargaining agreement with the Pennsylvania-Central Airlines Corporation on behalf of certain employees classified as janitors covering the rates of compensation, hours of work and working conditions of such employees, and providing a procedure for the orderly settlement of any disputes which might arise. It was further alleged that on January 31, 1947 the defendant Na-

tional Mediation Board, without notice to plaintiffs, issued a Determination of craft or class in certain designated cases then pending before the Board and that this Determination of craft or class by the Board rendered ineffective the aforesaid agreement of July 17, 1945; relegated the individual plaintiffs to a "voiceless minority," compelled without their consent to be represented by organizations which deny them membership because of their color; denied the individual plaintiffs the right to choose a bargaining representative to act for them in accordance with law; required the carrier to improperly divide its employees among the defendant unions; and further required the carrier to refuse to recognize the plaintiff union. It was alleged that said action of the Board and the alleged effect thereof violate provisions of the Railway Labor Act and deprived plaintiffs of rights guaranteed to them by the Constitution of the United States.

It was further alleged that the Determination of January 31, 1947 and the certification thereof as of May 13, 1947 by the defendant National Mediation Board to the Brotherhood of Railway & Steamship Clerks, et al. as the representative of the individual employee plaintiffs changed the contract then existing between the Pennsylvania-Central Airlines and the United Transport Service Employees of America, CIO, which change amounted to the impairment of the obligation of the contract in derogation of the Constitution of the United States (Joint App. 3, 4, 5, 6).

Further, in order to have a complete and full understanding of the procedures prior to the filing of the complaint, and upon which reliance was had in the complaint and supporting affidavit, we call attention to the following:

In the Determination made by the Board on January 31, 1947 respecting these cases which created the new craft or class which split the janitorial force in the Pennsylvania-Central Airlines, no notice was given to the United Transport Service Employees of America, CIO, of the hearings or to the individual persons themselves who were affected by this Determination. On February 28, 1947, at a meet-

ing called by Mediator Schoonover for the purpose of setting forth the rules governing the vote to be taken on March 6, 1947, Mr. George L. P. Weaver, assistant to the President of the UTSEA-CIO, and James A. Cobb, counsel, appeared on behalf of that organization and protested the inclusion of the janitors in this craft or class due to the existing contract between the UTSEA-CIO and the Pennsylvania-Central Airlines, and the inability of the UTSEA-CIO to make its views known in the previous hearing which determined this new craft or class as no notice had been had to it. In addition, no authorizations were presented to the Board covering the janitors in the offices or office buildings covered by the agreement entered into by the P-CA and UTSEA-CIO which would cause them to be included in this election.

On March 1, 1947 a letter was addressed to Mr. Schoonover, formally protesting the election. Despite this protest and the fact that the Board did not possess a quorum in order to hold a rehearing of the Determination of January 31, 1947 and to hear the protest of the Machinists, the Board proceeded with the holding of the election, stating it would impound the ballots until the decision resulting from the rehearing was made by the Board. The unions participating and eligible to represent these janitors under these new determinations of craft or class made by the Board are, namely, the Brotherhood of Railway and Steamship Clerks, AFL, who confine their membership to white persons working within the union's jurisdiction, and the International Association of Machinists who deny membership and equal participation to Negroes through ritual and local union practices (Joint App. 67-75).

On April 7, 1947 a notice in case #R-1735 was given to Willard S. Townsend, International President of UTSEA-CIO, to the effect that a hearing would be had on April 17, 1947, which hearing was continued over until April 21, 1947. On the aforesaid date, April 21, 1947, James A. Cobb, counsel for UTSEA-CIO, appeared and orally protested the hearing so far as the plaintiffs were concerned

and filed a written memorandum in support thereof. Of date April 25, 1947 the Board handed down its Finding of Fact and Determination. The third paragraph thereof included janitors and cleaners in and around offices and office buildings in the craft or class of clerical, office, stores, fleet and passenger service employees. Further on in this third paragraph it is stated—"Under the Board's Determination of January 31, 1947, janitors and cleaners in and around offices and office buildings were found to be a part of the craft or class of clerical, office, stores, fleet and passenger service employees. This Finding was based upon the fact that such employees perform a service function in offices and office buildings closely comparable to porters, messengers, mailroom personnel, elevator operators, telephone switchboard operators, mimeograph operators and other office machine operators. This fact is not refuted by the United Transport Service Employees of America . . ." (Joint App. 17-18).

ASSIGNMENT OF ERRORS

1. The Court erred in granting the motions for summary judgment.

2. The Court erred in not overruling the motions for summary judgment.

3. The Court erred in granting motions to dismiss.

4. The Court erred in not overruling the motions to dismiss.

SUMMARY OF ARGUMENT

1. The National Mediation Board, in making its Finding and Determination to the effect that under the Board's Determination of January 31, 1947 the janitors and cleaners in and around offices and office buildings were found to be a part of the craft or class of the clerical, office, stores, fleet and passenger service employees, was arbitrary and committed an abuse of its discretion and was contrary to

the Constitution of the United States in that it took away plaintiffs' rights of property without due process of law and denied them the equal protection of law and was against the public policy of the United States, and especially the District of Columbia, and the things done by it in violation of the rights here outlined were subject to judicial review.

2. That the Determination of January 31, 1947 and the certification thereof as of May 13, 1947 by the defendant National Mediation Board to the Brotherhood of Railway & Steamship Clerks as the representatives of the individual employee plaintiffs changed the contract then existing between the P-CA and UTSEA-CIO, which change amounted to the impairment of the obligation of the contract in derogation of the Constitution of the United States.

3. That the defendant National Mediation Board, in making its Finding and Determination of January 31, 1947, placing the individual employee plaintiffs in the Brotherhood of Steamship & Railway Clerks and the International Association of Machinists at which time the individual employee plaintiffs were not members of said defendant organizations and could not become members solely on account of their race and color, acted contrary to the Constitution of the United States and particularly to the 5th Amendment thereof.

ARGUMENT

1. *The National Mediation Board, in making its Finding and Determination to the effect that under the Board's Determination of January 31, 1947 the janitors and cleaners in and around offices and office buildings were found to be a part of the craft or class of the clerical, office, stores, fleet and passenger service employees, was arbitrary and committed an abuse of its discretion and was contrary to the Constitution of the United States in that it took away plaintiffs' rights of property without due process of law and denied them the equal protection of law and was against the public policy of the United States, and especially the District of Columbia, and the things done by it in violation of the rights here outlined were subject to judicial review.*

Supportive of this contention we again call attention to the happenings in this cause. Counsel for the defendants contend that the Board has done nothing other than to make a determination and finding of fact in accordance with the law. Let us examine the situation upon the facts as they are.

We admit that the Supreme Court of the United States has ruled that the Federal courts are without jurisdiction to review the findings of the National Mediation Board in the absence of a showing of abuse of discretion on the part of the Board. In this case it will be remembered that there was a contract existing as of July 17, 1945, entered into by the plaintiff UTSEA-CIO on behalf of the individual plaintiffs. That contract was recognized by the National Mediation Board and certification to that effect had been had to the P-CA. Without notice either to the UTSEA-CIO or to the individual plaintiffs an election was held and another Determination and Certification had. The P-CA was satisfied with its contract with the individual employees, and the individual employees were

satisfied with the contract with the P-CA. Both the P-CA and the individual plaintiffs were satisfied to have the UTSEA-CIO represent the employees in a bargaining capacity, and as before stated, without notice to either, all of that was changed. And it may be added by way of parenthesis there was really no dispute and the Board was without jurisdiction to interfere or meddle with this situation. Further it is our contention that the UTSEA-CIO held a contract with the P-CA to represent these employees of its airlines; therefore, the UTSEA-CIO had an interest in the preservation of its contract. When the National Mediation Board held an election among the employees represented by the UTSEA-CIO without notice to the UTSEA-CIO, it deprived that organization of its right to electioneer as a party in interest, and to take any other legitimate steps that it might feel were necessary to protect that interest.

As before stated, this constituted an abuse of discretion, resulting in the denial to the UTSEA-CIO of the due process of law. It is no answer to say that they had had a hearing after the election had been held and the results known. Due process of law does not mean that after a trial or hearing had been had and a Determination made to call in the parties in interest and say that we have had a hearing or trial, and have you anything to offer that would change the result. On the contrary, it means at the very genesis of the situation that there must be regular allegations, an opportunity to be heard, and a determination of findings in accordance with the rules and regulations laid down by the Statute or by the law of the land. In this case the Board not only did not follow the law of the land, but it did not follow its own Administrative Procedures Act. The Administrative Procedures Act provides for notice, opportunity to be heard, and a determination in accordance with the established rules and regulations of the Board. That was not done in this case. Certain it is that Congress never intended in passing this Act to take away the constitutional rights of individuals or

organizations and if so, the Act would be unconstitutional. See *U. S.* v. *Ju Toy*, 198 U. S. 252, 49 L. ed. 1070. And in this case we respectfully submit that if the contractural rights of the plaintiffs were disturbed or changed to the detriment of the plaintiffs without the regular legal procedures as above stated, that the courts would have jurisdiction to right this wrong and that the complaint should not be dismissed or summary judgment entered.

The defendants purport to rely upon the decisions of the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia which provide that proceedings by the National Mediation Board under the Railway Labor Act are not subject to judicial review.

Switchmen's Union v. *Board*, 320 U. S. 297
General Committee v. *M. K. T. R. Co.*, 320 U. S. 323
Brotherhood of Railway & Steamship Clerks, et al. v. *United Transport Service Employees*, 320 U. S. 715
Nat'l. Fed. Ry. Workers v. *Mediation Board*, 79 App. D. C. 16, 141 F. (2d) 725
Order of Railway Conductors v. *Mediation Board*, 79 App. D. C. 1, 141 F. (2d) 366, writ dismissed 323 U. S. 166

It cannot be reasonably argued, however, that this suggestion of an inability to judicially review proceedings by the Mediation Board could conceivably mean that the Board could engage in actions impairing legal contracts and to deprive persons and organizations of their constitutional rights without possibility of judicial recourse. We submit that it is unconstitutional and an abuse of the discretion granted it under the Act for the National Mediation Board to indirectly do what the Supreme Court and the law itself provides cannot be done directly by putting into effect discriminatory regulations under the guise of simply classifying workers. As has been indicated in the instant case, there was in existence a valid contract between the

employees represented by the UTSEA-CIO and the airline involved. The National Mediation Board, by its action, without notice not only violates and impairs the terms of this valid contract effectively being carried forward by the parties in interest, but contrary to the wishes and without an opportunity granted to them to express their desires, allocates and assigns the individual plaintiffs to membership in an organization in which they are not wanted, to which they may not validly belong and which neither pretends to nor does act in a representative capacity for them, thus leaving them voiceless in this matter of employment so vital to them. That no such condition was intended by any decision of the United States Supreme Court has recently been voiced in the case of *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210, and *Steele* v. *La. N. R. Co.,* 323 U. S. 192.

In the opinion in that case, Chief Justice Stone stated: ". . . If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading."

Can this language be misunderstood? Is there basis here for the suggested dismissal of the complaint or a summary judgment in this case, or does it rather specifically say that the courts must pass upon these constitutional questions?

In his concurring opinion in the same case, Mr. Justice Murphy stated: "The economic discrimination against Negroes practiced by the Brotherhood and the railroad under color of Congressional authority raises a grave constitutional question which should be squarely faced. . . . . The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too

virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation."

How, we ask, could the question be squarely faced except by seeking the determination by a judicial tribunal as was done in this case?

> 2. *That the Determination of January 31, 1947 and the certification thereof as of May 13, 1947 by the defendant National Mediation Board to the Brotherhood of Railway & Steamship Clerks as the representatives of the individual employee plaintiffs changed the contract then existing between the P-CA and UTSEA-CIO, which change amounted to the impairment of the obligation of the contract in derogation of the Constitution of the United States.*

We maintain and take the position that the determination of January 31, 1947 and certification had by the National Mediation Board of May 13, 1947 were a transfer of the contract made between the P-CA and the UTSEA-CIO on behalf of these employees, which amounted to a breach and impairment of that contract contra to the Constitution of the United States. The National Mediation Board and the other defendants attempt to avoid the effects of this determination and certification by saying that the National Mediation Board has done nothing other than to make its determination and certification, with the inference that the responsibility for action lies other than at its door. The fact is, however, that the Brotherhood is acting as the bargaining agent for the individual plaintiffs involved, based upon the certification of the Board and with its full knowledge and approval as is evidenced by a communication had from the P-CA to Mr. Cole, Secretary to the Mediation Board, dated September 5, 1947, which we quote (Joint App. 8):

"September 5, 1947

"Mr. ROBERT F. COLE, *Secretary*
National Mediation Board
Washington, D. C.

"Dear Mr. Cole:

"Under the Determination of Case R-1735 and other similar cases by the National Mediation Board on January 31, 1947, the class and craft of Clerical, Office, Stores, Fleet and Passenger Service Employees was determined partly to consist of the janitors who clean offices. Those who clean in the hangars were determined to be part of the class and craft of mechanics. At the time of this Determination Pennsylvania-Central Airlines then had an effective agreement with the UTSEA-CIO covering janitors. At the subsequent hearing held on April 21, 1947 on the same class and craft question this position was reaffirmed by the Board.

"By Certification dated May 13, 1947 the National Mediation Board certificated the Brotherhood of Railway Clerks as the representative of clerical, office, stores, fleet and passenger service employees in this Company, and by virtue of the election they took over two agreements; namely, the UTSEA covering the janitorial employees in our main offices, and the UAW-CIO, which covered the stockroom employees. Acting on our interpretation of the law and the procedures of the National Mediation Board we believe that we are correct in our assumption that we are bound to look to the Brotherhood for the administration of these contracts, as the bargaining agent for these groups, until such time as the Brotherhood may negotiate a new contract.

"It would then follow that our treatment of the janitorial crew who clean in and around the shops and hangars are part of the mechanical group, and therefore, represented by the IMA. There has been some contention that this procedure is not proper and I am writing to you for any clarification of this matter that you may be able to give.

Very truly yours,

J. W. BURKE,
Personnel Director."

"JWB:yec

September 12, 1947

"Mr. J. W. Burke, Jr., *Personnel Director*
Pennsylvania-Central Airlines Corporation
Washington National Airport
Washington 1, D. C.

"Dear Mr. Burke:

"Your letter of September 5, 1947, on the subject of representations of janitors employed by the Pennsylvania-Central Airlines has been received in this office.

"Since the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was certified under Case R-1735 as representing the craft or class of clerical, office, stores, fleet and passenger service employees, that organization thereby acquired representation of janitors who clean the offices, these employees previously having been represented by the United Transport Service Employees of America, CIO. Under the above mentioned certification the Brotherhood of Railway and Steamship Clerks is obligated to represent these employees under the terms of the agreement negotiated by the UTSEA until such time as they are covered in a revised agreement negotiated by the Brotherhood.

"The same situation applies to the stockroom employees who were formerly represented by the United Automobile Workers of America, CIO.

"We trust the above information answers your inquiry.

"Very truly yours,

/s/ Robt. F. Cole
E.I.

Robert F. Cole,
Secretary."

In view of the foregoing, to say the contract has not been changed at the instance of the National Mediation Board is a stultification of the facts and procedures. Until May 13, 1947 the UTSEA-CIO had an agreement with the P-CA to represent the individual plaintiffs and was doing so, agreeable to all parties concerned. Since the certification of the Board of the date mentioned the Brotherhood has taken over the contract and has been representing the

individual plaintiffs, as before stated, with the approval and, we may add, at the instance of the National Mediation Board. Certain it is that is both impairment and a breach of the contract. The sanctity of a contract is a matter of such importance as to have been made a part of the Constitution of the United States. We quote: "Section 10-1. * * * No State shall pass a law impairing the obligation of contracts. . . ."

The Supreme Court of the United States has almost from the beginning of our government taken the position that while this particular section was not binding on the Federal Government, that the Federal Government was placed in the same category as individuals and the states, and had no legal right to repudiate its own contract. The binding quality of the obligation was considered in the *Sinking Fund Cases,* 99 U. S. 700, 25 L. ed. 496. The question before the court in those cases was whether certain action was warranted by a reservation to the Congress of the right to amend the charter of a railroad company. The court took occasion to state emphatically the obligatory character of the contracts of the United States. The Court said: "The United Sttaes are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

Those cases, as well as a long line of other cases, were quoted with approval in the very recent case of *Perry* v. *United States,* 294 U. S. 330, 79 L. ed. 913, in which case Chief Justice Hughes, speaking for the Court, said: "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. . . ." and quotes some 25 to 30 cases in support of that proposition. That being true, how can it be argued on any degree of morality that the National Mediation Board, an instrument of the Government, can do indirectly what it cannot do directly? If Congress should pass such a law the Courts would have no hesitancy in holding them beyond

the power of Congress so to do, and any branch of the Government attempting to do such a thing, the courts certainly have jurisdiction to intercede and right the wrong.

Could there be a more effectual transfer of parties to an agreement by an independent outside influence? Could the obligations of a contract be more definitely impaired? Could persons be denied more conclusively a voice in their own bargaining possibilities? Could the property rights of the UTSEA-CIO and the individual plaintiffs be in any wise more effectively violated?

In this connection we want to reiterate and reaffirm all that we have said in our Points and Authorities in respect to the opposition to the motion to dismiss, with this additional word, since our Points and Authorities were filed upon the first motion to dismiss and our Points and Authorities in opposition thereto, an Affidavit was filed by the Brotherhood in which it says it has changed its Constitution and By-laws to the effect that persons of color are admitted on the same terms as white at present, and that it became effective as of July, 1947. The Determination in this case was made as of January 31, 1947, and Certification as of May 13, 1947. That would in no wise change the position of these plaintiffs. While a retroactive law may be upheld as constitutional, it is never upheld as affecting and changing the rights of parties to their detriment.

> *3. That the defendant National Mediation Board, in making its Finding and Determination of January 31, 1947, placing the individual employee plaintiffs in the Brotherhood of Steamship & Railway Clerks and the International Association of Machinists at which time the individual employee plaintiffs were not members of said defendant organizations and could not become members solely on account of their race and color, acted contrary to the Constitution of the United States and particularly to the 5th Amendment thereof.*

It would seem that supportive of this argument one would need only turn to the brief of the Government, filed as

Amicus Curiae, in the case of *Turnstall* v. *Brotherhood of Locomotive Firemen, et al.* and *Steele* v. *L. & N. R. Co., et al.* Nos. 37 and 45, October Term, 1944, in the Supreme Court of the United States, from which we quote:

> "The discrimination in these cases is aggravated by the fact that the colored employees have no opportunity to participate in the formulation of the policies which the Brotherhood maintains as the representative of the entire craft. For they may not become members of the Brotherhood and may not take part in its deliberations. Thus they do not share in the protection against arbitrary or discriminatory action which is available to members of the organization. The officials of labor organizations which have achieved representative status under the National Labor Relations Act of the Railway Labor Act are to a large extent guided by the view of the members of the organization for which they speak. The latter have ultimate power to approve or disapprove. An individual employee who is a member of the representative union can go to meetings, participate in discussions, and obtain a hearing for his viewpoint. Even if his arguments do not prevail, the existence of such a forum in which the negotiators for the craft can be called to account has a tendency to avert arbitrary, unreasonable, or discriminatory action, and normally insures that such action will not be taken. Similarly, an employee who is not, but could if he chose be, a member of the union cannot complain of his own failure to take part in the deliberations which are to affect his working conditions. Moreover, he is a member of the group to which the union looks for support to maintain its status as statutory representative. Where, however, a union excludes a minority of the craft from membership these ordinary controls upon the process of collective bargaining cannot benefit the excluded groups. In such a case the majority representative may feel free to ignore the interests of the minority, as is here alleged.
>
> "Certainly where an organization enters into agreements for the purpose of discriminating against employees in the bargaining unit who are not permitted to become members, it cannot be said to be acting in good faith as the representative of the entire craft.

"This does not mean that a labor union as a private organization has no power to fix its own eligibility requirements, even if the result is to discriminate against persons because of their race. As long as the organization is acting solely in a private capacity, no legal objection may be made. But here the Brotherhood is exercising, and insisting upon exercising, the right granted by the Railway Labor Act to act as the exclusive representative of the entire craft of firemen. . . ."

Quoted with approval, we find the following notation:

"The only prior decision on this point under the Railway Labor Act held that Congress never intended such 'an intolerable situation' as to 'force upon any class of employees representation through an agency with whom it has no affiliation nor right of association.' *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees,* 137 F. (2d) 817, 821-822 (App. D. C.). In that decision, which was reversed in this Court on jurisdictional grounds (320 U. S. 715), Chief Justice Groner, concurring, declared (137 F. (2d), at 821-822): ' * * * the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription *and at the same time insist that Brotherhood alone is entitled to speak for them* in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision unholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent of its face, and as has been recognized and confirmed by the Supreme Court in many decisions, is to insure freedom of choice in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity

> of classification in accordance with established custom, *nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association.* It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their spokesman with the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny in many respects analagous to 'taxation without representation.' And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish *the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor.* In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws." (Italics supplied.)

It is manifest from the above that when the Supreme Court entered its decision in the Tunstall and Steele cases it has before it for consideration its decision in the *Brotherhood of Railway & Steamship Clerks, et al.,* v. *United Transport Service Employees of America, supra,* and either overruled same where colored were not permitted to belong, or differentiated the situation as applied to the facts in the instant case.

CONCLUSION

Summary judgments are concededly drastic action, and the allowance of motions to dismiss without granting litigants their day in court should unquestionably be indulged in with care, precaution, and an eye single to the rights of all parties. It is respectfully submitted that the showing of the pleadings in the instant case reveal to a demonstration a violation of the rights of the parties plaintiff, a deprivation of constitutional rights and privileges, which the defendants should have been called upon to answer, and the errors complained of corrected.

It is peculiarly significant in the instant case that the steps taken violative of the plaintiffs' rights by the National Mediation Board were not even sought by the other defendants; were manifestly not only unfair to the plaintiffs and violative of their rights, but were met with an apparent lack of desire by the defendants International Association of Machinists and were approached with concern by the defendant Pennsylvania-Central Airlines who had dealt without friction on the matter with the corporate plaintiff and whose concern was only allayed by the response of the Mediation Board, through its Secretary (Joint App. 9-10).

It is significant too in this connection that the National Mediation Board now pretends that it did nothing other than the colorless assigning of members to respective classes or crafts, but one cannot read the response of Mr. Cole, the Secretary, without immediately knowing, as the plaintiffs contend, that the action as a matter of fact was a designation of the new groups as bargaining agents for these employee plaintiffs, and an abrogation of the existing contract with the corporate plaintiff (Joint App. 9-10).

It is respectfully submitted that the lower court was in error in granting the motions for summary judgment and in dismissing the cause.

Respectfully submitted,

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APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10010.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, ET AL., *Appellants,*

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

---

1 Filed Nov 26 1947

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Civil Action No. 4807-47.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, 718 Jackson Place, N. W., on its own behalf, and on behalf of

JAMES A. WASHINGTON, 1812 Central Place, N. E., and

JAMES E. EDMONDS, 4327 Foote Street, N. E., Washington, D. C., *Plaintiffs,*

v.

NATIONAL MEDIATION BOARD, F between 18th & 19th Sts., N. W.,

PENNSYLVANIA CENTRAL AIRLINES CORP., Washington National Airport,

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, 10 Independence Avenue, S. W.,

INTERNATIONAL ASSOCIATION OF MACHINISTS, 9th and Mt. Vernon Place, N. W., Washington, D. C., *Defendants.*

Complaint for Mandatory Injunctive Relief Against National Mediation Board, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and International Association of Machinists, and for Reinstatement of Contract of July 17, 1945 Between Pennsylvania Central Airlines Corporation Classified as Janitors, as Represented by United Transport Service Employees of America, CIO.

This action arises under the United States Code, Title 28, Section 41(8), 125 and 400, and Title 45, Section 151 et seq., commonly known as the Railway Labor Act.

2. The plaintiff United Transport Service Employees of America, CIO, on its own behalf, and James A. Washington and James E. Edmonds, respectively on their own behalf, and on behalf of others similarly situated, for the purpose of enforcing their constitutional contract rights and to avoid discriminatory and unlawful practices as outlined by the decisions of the Supreme Court of the United States, respectfully represent:

2 That heretofore, to wit, July 17, 1945, a binding agreement was entered into between defendant Pennsylvania Central Airlines Corporation and employees of Pennsylvania Central Airlines Corporation, classified as janitors, as represented by the plaintiff United Transport Service Employees of America, CIO, governing rates of compensation, hours of work, working conditions and a procedure for the orderly settlement of any disputes, and that said agreement remained in full force and effect in accordance with the terms thereof until the commission of the grievances hereinafter complained of.

That thereafter, and as of to wit, January 31, 1947, the defendant, National Mediation Board, without notice to the plaintiff United Transport Service Employees of America, CIO, in its representative capacity for itself and the other plaintiffs, entertained and gave a determination of craft or class in matters captioned: "In the matter of REPRESENTATION OF EMPLOYEES of the National Airlines, Inc., Northeast Airlines, Inc., Pan American Airways, Inc., Pennsylvania Central Airlines Corp., Radio operators and teletype operators, clerical, office, stores, fleet and passenger service employees, Nos. R-1706, R-1718, R-1719, R-1720, R-1721, R-1729 and R-1735, DETERMINATION OF CRAFT OR CLASS, January 31, 1947", the result of which said determination was to violate and render ineffective the aforementioned agreement of July 17, 1945, which said action on the part of the said National Mediation Board, acting in its representative capacity under authority of the Government, is in derogation of the Constitution of the United States and violative

of the contract clause thereof. This said agreement had been filed with the National Mediation Board and tended to show that the janitors, plaintiffs herein, had unanimously voted for the United Transport Service Employees of America, CIO, co-plaintiffs, to represent them as bargaining agent. None-the-less, and without regard for the said outstanding contract and its terms, the National Mediation Board, without notice of any kind or character to the said United Transport Service Employees-CIO, undertook to and did abrogate the terms of the aforementioned agreement and undertook to establish a new designation of craft or class, resulting in the relegating of the individual plaintiffs to a voiceless minority, without their consent, in two organizations purporting to be charged with acting for them when they were, as a matter of fact, denied membership or voice in said organizations solely on account of color; all of which was an abridgment of their privileges and immunities as citizens of the United States and a denial to them of equal protection under the law, which is in derogation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs set forth in this regard that the National Mediation Board has accepted and recognized the qualifications of the United Transport Service Employees of America, CIO, as a craft or class organization representing redcaps, dining car waiters, pullman and laundry workers, redcaps on airlines, janitors and porters on airlines, by either actual certification or through knowledge of executed agreements with, to wit, fifty (50) railroad and airline companies.

Plaintiffs set forth that the result of the determination of the cases hereinbefore referred to and determined by the National Mediation Board on, to wit, January 31, 1947, is that the individual plaintiffs and those for whom they sue, all of whom are Negroes, will have forced upon them a representation by organizations other than the organization of their choice and organizations to which they cannot belong and in which they have absolutely no voice, solely

on account of color, which the plaintiffs are advised is a denial of their rights of choosing a bargaining agent to act for them in accordance with the law in such cases made and provided.

Plaintiffs set forth that the Pennsylvania Central Airlines Corporation, with whom the plaintiffs had the agreement hereinbefore referred to, dated July 17, 1945, is forced by the terms of the determination of the National Mediation Board to improperly divide its employees under the jurisdiction of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the one hand, and the International Association of
4 Machinists on the other, and to fail and refuse to recognize the terms of its binding agreement entered into with the United Transport Service Employees of America, CIO, as hereinbefore set forth, and to look to these two organizations to act as bargaining agents for these Negro employees, both of which said organizations, as before indicated, refuse them membership and deny them participation.

WHEREFORE, the premises considered, plaintiffs pray:

1. That process of this Court issue against the defendants and each of them, requiring them to answer the exigencies of this complaint.

2. That pendente lite and permanently thereafter, the defendant National Mediation Board be required by mandatory order of this Court to set aside and vacate so much of its determination of January 31, 1947 of craft or class numbered R-1706, R-1718, R-1719, R-1720, R-1721, R-1729 and R-1735 as purports to designate the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and/or the International Association of Machinists as bargaining agents for these individual plaintiffs.

3. That upon final hearing of this cause this Court by mandatory injunction require the reinstating in full force and effect of the agreement heretofore entered into between

the Pennsylvania Central Airlines Corporation and United Transport Service Employees of America, CIO, dated July 17, 1945.

4. That by order of this Court the defendants Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and International Association of Machinists be enjoined from in any wise exercising any control or jurisdiction over these plaintiffs or attempting to in any wise act as bargaining agent for the plaintiffs herein.

5. For such other and further relief as the nature of the case may require and to this Court see just and proper.

COBB, HOWARD and HAYES,
Attorneys for Plaintiffs,
613 F Street, N. W.

By: JAMES A. COBB,
GEO. E. C. HAYES.

* * * * * * * * * * *

5 Filed Dec 23 1947

Answer of Defendant

Pennsylvania-Central Airlines Corporation.

FIRST DEFENSE.

The complaint fails to state a claim against defendant Pennsylvania-Central Airlines Corporation (hereinafter referred to as "defendant") upon which relief can be granted.

SECOND DEFENSE.

1. Defendant admits the allegations made in the first paragraph on page two of the complaint.

2. With respect to the second paragraph commencing on page two of the complaint, the defendant admits that the National Mediation Board on January 31, 1947, made a determination of craft or class in case No. R-1735, by which

determination the class and craft of Clerical, Office, Stores, Fleet and Passenger Service Employees in defendant's employ was determined to consist partly of janitors; the defendant is without information sufficient to form a belief as to the truth of the remaining allegations in this paragraph of the complaint.

6 3. Defendant is without information sufficient to form a belief as to the truth of the allegations made in the first and second paragraphs commencing on page three of the complaint.

4. With respect to the third paragraph commencing on page three of the complaint, the defendant admits that pursuant to determinations and certifications of the National Mediation Board the defendant has negotiated, and has signed collective bargaining agreements, with the two said labor unions (other than plaintiff union) representing janitors in defendant's employ; the defendant is without information sufficient to form a belief as to the truth of the remaining allegations in this paragraph of the complaint.

THIRD DEFENSE.

Defendant has acted throughout in full compliance with law as administered by the National Mediation Board.

The National Mediation Board on January 31, 1947, determined that janitors employed by defendant to clean offices are in the class and craft of Clerical, Office, Stores, Fleet and Passenger Service Employees, and that janitors employed by defendant to clean hangar spaces are in the class and craft of Mechanics. Since that determination, defendant has negotiated and entered into collective bargaining agreements with the labor union which, as to each class and craft, has been duly elected by the employees represented and has been duly certified by the National Mediation Board.

Defendant's procedure in handling this matter has been expressly approved by the National Mediation Board. This

is shown by the correspondence attached hereto as exhibits A and B, which exhibits are made a part hereof.

ROBERT B. HANKINS,
Attorney for Defendant.

PENNSYLVANIA-CENTRAL AIRLINES CORPORATION.

STOCKTON, ULMER & MURCHISON,
1016 Ring Building
18th and M Sts., N. W.
Washington 6, D. C.

7 Filed Dec 23 1947

Exhibit A.

PENNSYLVANIA-CENTRAL AIRLINES CORPORATION

September 5, 1947

Mr. Robert F. Cole, Secretary
National Mediation Board
Washington, D. C.

Dear Mr. Cole:

Under the Determination of Case R-1735 and other similar cases by the National Mediation Board on January 31, 1947, the class and craft of Clerical, Office, Stores, Fleet and Passenger Service Employees was determined partly to consist of the janitors who clean offices. Those who clean in the hangars were determined to be part of the class and craft of mechanics. At the time of this Determination Pennsylvania-Central Airlines then had an effective agreement with the UTSEA-CIO covering janitors. At the subsequent hearing held on April 21, 1947 on the same class and craft question this position was reaffirmed by the Board.

By Certification dated May 13, 1947 the National Mediation Board certificated the Brotherhood of Railway Clerks as the representative of clerical, office, stores, fleet and passenger service employees in this Company, and by virtue of the election they took over two agreements;

namely, the UTSEA covering the janitorial employees in our main offices, and the UAW-CIO, which covered the stockroom employees. Acting on our interpretation of the law and the procedures of the National Mediation Board we believe that we are correct in our assumption that we are bound to look to the Brotherhood for the administration of these contracts, as the bargaining agent for these groups, until such time as the Brotherhood may negotiate a new contract.

It would then follow that our treatment of the janitorial crew who clean offices are represented now by the Brotherhood, and those who clean in and around the shops and hangars are part of the mechanical group, and therefore, represented by the IAM. There has been some contention that this procedure is not proper and I am writing to you for any clarification of this matter that you may be able to give.

Very truly yours,

/s/ J. W. Burke
J. W. Burke, Jr.,
Personnel Director.

JWB: yec
bc: G I P Weaver

Filed Dec. 23, 1947

8 **Exhibit B.**

NATIONAL MEDIATION BOARD.

Washington (25)

September 12, 1947

Mr. J. W. Burke, Jr., Personnel Director
Pennsylvania-Central Airlines Corporation
Washington National Airport
Washington 1, D. C.

Dear Mr. Burke:

Your letter of September 5, 1947, on the subject of representation of janitors employed by the Pennsylvania-Central Airlines has been received in this office.

Since the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was certified under Case R-1735 as representing the craft or class of clerical, office, stores, fleet and passenger service employees, that organization thereby acquired representation of janitors who clean the offices, these employees previously having been represented by the United Transport Service Employees of America, CIO. Under the above mentioned certification the Brotherhood of Railway and Steamship Clerks is obligated to represent these employees under the terms of the agreement negotiated by the UTSEA until such time as they are covered in a revised agreement negotiated by the Brotherhood.

The same situation applies to the stockroom employees who were formerly represented by the United Automobile Workers of America, CIO.

We trust the above information answers your inquiry.

Very truly yours,

/s/ Robt. F. Cole
E.I.
ROBERT F. COLE,
Secretary.

Please make submission and replies to correspondence in duplicate.

* * * * * * * * * *

10 Filed Jan 30 1948

Motion to Dismiss.

The defendants, the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees and the International Association of Machinists, move the Court as follows:

1. To dismiss the above-styled action on the ground that the Court lacks jurisdiction, because the actions of the defendant, National Mediation Board, of which the plaintiffs complain, are not subject to judicial review.

2. To dismiss the complaint filed in the above-entitled action because it fails to state a claim against these defendants upon which relief can be granted, or an injunction issued as prayer in said complaint, or otherwise.

BINGHAM, COLLINS, PORTER & KISTLER.

LINTON M. COLLINS,
921 Tower Building,
Washington 5, D. C.
Attorneys for said defendants.

Of Counsel:

MULHOLLAND, ROBIE & MCEWEN
Suite 741 Nicholas Building
Toledo 4, Ohio

* * * * * * * * * *

12 Filed Jan 30 1948

Motion to Dismiss.

Defendant National Mediation Board moves the court to dismiss complaint filed in the above-entitled action for the following reasons:

1. The court lacks jurisdiction over the subject matter. The actions of the defendant National Mediation Board of which plaintiffs complain are not subject to judicial review.

2. The complaint fails to state a claim upon which relief can be granted or an injunction issued as prayed in said complaint or otherwise.

EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
Attorney for National Mediation Board.

JOHN F. SONNETT,
Assistant Attorney General.

GEORGE MORRIS FAY,
United States Attorney.

January 30, 1948.

* * * * * * * * * *

13 Filed Mar 22 1948

Motion of Defendant National Mediation Board For Summary Judgment.

Now comes the defendant National Mediation Board through its attorneys, and moves the Court to grant summary judgment for the defendant on the ground that there is no genuine issue as to any material fact in this case and that said defendant is entitled to such judgment as a matter of law. In support of this motion the Court is respectfully referred to: (1) the affidavit of Robert F. Cole, Secretary, National Mediation Board, attached and made a part hereof; (2) the motions for summary judgment and attached affidavits filed in this cause by the defendant labor unions; (3) this defendant's motion to dismiss and supporting statement of points and authorities filed herein on January 30, 1948; (4) this defendant's memorandum brief in support of both this motion for summary judgment and its motion to dismiss the complaint.

EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

Attorney for Defendant,
National Mediation Board.

JOHN F. SONNETT,
Assistant Attorney General.

GEORGE MORRIS FAY,
United States Attorney.

Dated: March 22, 1948.

* * * * * * * * * *

14 Filed Mar 22 1948

Affidavit of Robert F. Cole, Secretary of the National Mediation Board.

City of Washington, District of Columbia, ss:

I, Robert F. Cole, being duly sworn, do hereby depose and say:

1. I am the duly appointed Secretary of the National Mediation Board and have been acting in that position continuously since July 1, 1944.

2. As Secretary, I have been delegated authority by the Chairman of the National Mediation Board to receive applications invoking the services of the National Mediation Board to investigate representation disputes among employees subject to the provisions of the Railway Labor Act, and to issue certifications by the Board of bargaining representatives for such employees pursuant to the provisions of Section 2, Ninth of the Railway Labor Act, as amended.

3. The statements made in this affidavit are based upon information received by me in my official capacity and relate to facts of which I am personally cognizant and which, based upon such knowledge, I certify to be true and accurate.

4. On or about October 28, 1946, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a labor organization, invoked the services of the National Mediation Board to investigate, under the provisions of Section 2, Ninth of the Railway Labor Act, as amended, an alleged representation dispute among clerical, office, station and storehouse employees of the Pennsylvania-Central Airlines Corporation.

5. The application was formally docketed by the Board for investigation. Some of the employees covered by the application were, at the time, represented by the International Association of Machinists. Disagreement developed between this latter named organization and the Brotherhood of Clerks over the proper grouping of employees cov-

ered by the application for purposes of determining representation under the Railway Labor Act.

6. Following its usual practice when such disagreement develops, the Board conducted a public hearing in Washington, D. C. on November 13-15, 1946.[1] Based upon
15 the record as developed by the investigation, hearing, and briefs filed by parties to the alleged dispute, the Board on January 31, 1947, issued a Determination holding that employees involved in the dispute constitute a craft or class [2] for representation purposes under the Act (certified copy attached as Exhibit No. 1). As thus determined, the craft or class is designated for general identification purposes as clerical, office, stores, fleet and passenger service employees.

7. Under the Board's Determination of January 31, 1947, janitors and cleaners in and around offices and office buildings were found to be a part of the craft or class of clerical, office, stores, fleet and passenger service employees. This finding was based upon the fact that such employees perform a service function in offices and office buildings closely comparable to porters, messengers, mail room personnel, and other office attendants. The Board did not determinne that these janitors and cleaners would be represented by the Brotherhood of Railway Clerks or any other organization. It merely determined that they were a part of the aforesaid craft. The Board's determination of a craft or class is a necessary preliminary finding to its procedure under Section 2, Ninth of the Railway Labor Act of conducting an election for representation purposes where question is raised as to proper grouping of employees for representation purposes.

8. In applying the Board's determination for purposes of conducting a representation election among the 1749

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[1] A transcript of the proceedings before the Board is on file and a certified copy of the record of these proceedings will be made available to the Court if such record becomes material.

[2] Craft or class is the designation employed in the Railway Labor Act for the group of employees entitled to vote as a unit for the purpose of selecting a bargaining representative.

employees in this craft or class on Pennsylvania-Central Airlines, it was discovered for the first time during February 1947, that some eight of this total number of employees, who were janitors and cleaners in and around the offices and office buildings, were represented by a labor organization known as the United Transport Service Em-
16 ployees of America, C.I.O. (hereinafter referred to as United), and were covered by a labor agreement effective July 17, 1945, between that organization and Pennsylvania-Central. It was due to the fact that the number of such employees is so small in relation to the total number in the craft or class that their representation by United was previously overlooked.

9. To correct this oversight, the undersigned addressed a letter, under date of February 7, 1947, to Mr. Willard S. Townsend, International President of United (certified copy attached, Exhibit No. 2), advising him of the representation election to be conducted involving some of the employees represented by his organization, and requesting him to advise the name of the person who would represent the interest of his organization in the conduct of the election. Due to the oversight every effort was made during subsequent investigation of the dispute to assure that United was afforded full opportunity to represent its interests.

10. In response to this notice, on February 13, 1947, United protested against employees which it represented being included in the proposed representation election, and insisted on its continued right to represent janitors and cleaners under the agreement of July 17, 1945, between United and Pennsylvania-Central (certified copy of letter of protest attached, Exhibit No. 3).

11. Other protests respecting the determination of January 31, 1947, were received from other parties to the dispute and, in response to requests for reconsideration, the Board directed that a second hearing be held. Notices of

such hearing were issued under dates of February 11, 1947, and April 1, 1947 (certified copies attached, Exhibit No. 4). United was provided copies of these hearing notices. In addition, a letter was directed by order of the Board under date of April 7, 1947, (certified copy attached, Exhibit No. 5) to United, as well as to other parties to the dispute, advising that by oversight United had not been afforded an opportunity to participate in the hearing of November 1946, and accordingly would be accorded a hearing on April 17 (later extended to April 21) with respect to its opposition to the inclusion of janitors and
17 cleaners in and around offices and office buildings in the craft or class of clerical, office, stores, fleet and passenger service employees.

12. The second hearing was held before the Board at Washington, D. C. on April 21, 1947. United was represented at this hearing by the Honorable James A. Cobb, who presented the contentions of that organization. A transcript of the proceedings was made and is on file with the National Mediation Board, and a certified copy of such transcript will be furnished to the Court at the time of hearing of United Transport Service Employees of America, C.I.O., et al. v. National Mediation Board, et al., Civil Action No. 4807-47 now pending before the District Court of the United States for the District of Columbia.

13. Following the hearing, the Board, on April 25, 1947, issued a second determination of craft or class (certified copy attached, Exhibit No. 6) in which consideration was given to the contentions of United, but in which the Board affirmed its determination of January 31, 1947, that janitors and cleaners in and around offices and office buildings were a part of the craft or class of clerical, office, stores, fleet and passenger service employees.

14. Prior to the second hearing on April 21, 1947, and the determination of April 25, 1947, the Board conducted a representation election during the period March 6-31, 1947,

among the craft or class of clerical, office, stores, fleet and passenger service employees of Pennsylvania-Central Airlines Corporation, as directed in its determination of January 31, 1947. As stated in the Board's letter of April 7, 1947 (Exhibit No. 5), janitors and cleaners in and around office buildings were included in the election. However, to protect the interests of United in the dispute, their ballots were impounded pending final determination of the craft or class by the Board. The election was conducted by Mr. T. E. Schoonover, Mediator, assigned by the Board. In the preparations for the election, United was represented by Judge James A. Cobb, previously referred to, with whose knowledge and consent the name of United was carrier in printed form on the ballot used in the election (certified copy attached, Exhibit No. 7). In order
18 that United would have full information respecting the election, the undersigned on March 3, 1947, forwarded to Judge Cobb copies of the Notice of Election (certified copy attached, Exhibit No. 8), and a list of the employees eligible to participate in the election. In addition, United was afforded an opportunity to have an observer present at the polls during the election but did not elect to do so. Similarly, United was afforded an opportunity to have an observer present when the ballots were counted on May 7, 1947, but again did not choose to take advantage of this opportunity. In counting the ballots of the 1117 employees who participated in the election, it was found that eight of them voted for United, and these votes were credited to that organization. This is shown in the certification issued by the Board under date of May 13, 1947 (certified copy attached, Exhibit No. 9), a copy of which was provided United on May 15, 1947 (Exhibits No. 10). As shown by the certification, the Brotherhood of Railway & Steamship Clerks received the highest number of votes and accordingly on May 13, 1947, was certified as the bargaining representative of clerical, office, stores, fleet

and passenger service employees of the Pennsylvania-Central Airlines Corporation.

15. The Board's craft or class determination of January 31, 1947, included janitors and cleaners in and around the offices and office buildings, but did not include such employees who work in and around hangars in repair and maintenance shops in proximity with mechanic employees of the airlines. This demarcation was communicated to United in the Board's letter of April 7, 1947, to which previous reference has been made (Exhibit No. 5). Accordingly, insofar as the latter type of janitors and cleaners is concerned neither the Board's determination of January 31, 1947, nor its subsequent certification of the Brotherhood of Railway Clerks on May 13, 1947, affects the right of United to continue to represent said employees. Moreover, insofar as the International Association of Machinists is concerned, its last certification by the Board on February 26, 1946, to represent employees of the Pennsylvania-Central Airlines Corporation expressly excludes
19 hangar cleaners and janitors (certified copy attached, Exhibit No. 11).

16. The transcript of hearing before the Board on April 21, 1947 (referred to in paragraph 12 hereof) contains the statement by Mr. W. M. Davis, Assistant to the Grand President of the Brotherhood of Railway and Steamship Clerks, that "colored employees have membership in our organization, and have had for some time, through an auxiliary arrangement". This statement of fact was not contradicted at the hearing by United's representative. On the contrary, Mr. Cobb read to the Board an extract from the membership qualifications published by the Brotherhood of Railway and Steamship Clerks to the effect that no applicant to that organization is barred on account of creed, color, or nationality; that Negro members are carried as an auxiliary local under the jurisdiction of the near-

est local of the organization; and that Negroes are being admitted and are entitled to all benefits and protections.

Attached Exhibits (11).

ROBERT F. COLE.

Sworn and subscribed before me this 8 day of March, 1948.

E. A. TREACY,
Notary Public.

My commission expires August 14, 1949.

* * * * * * * * * *

Exhibit No. 1

NATIONAL MEDIATION BOARD
Washington

FILED
MAR 22 1948
HARRY M. HULL, Clerk

In the matter of

REPRESENTATION OF EMPLOYEES

of the

National Airlines, Inc.
Northeast Airlines, Inc.
Pan American Airways, Inc.
Pennsylvania-Central Airlines Corp.

Radio operators and teletype operators; Clerical, office, stores, fleet and passenger service employees.

R-1706 - R-1718
R-1719 - R-1720
R-1721 - R-1729
R-1735

Determination of Craft of Class

January 31, 1947

The services of the National Mediation Board were invoked in accordance with Section 2, Ninth, of the Railway Labor Act, to investigate representation disputes among certain employees of the airlines named in the heading. The applications were filed by various organizations setting forth their respective claims for representation by craft or class and, in each case, were supported by authorizations signed by the employees. The applications as covered in the various docket numbers are summarized as follows:

R-1706—National Airlines, Inc.

An amended application was filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as BRC) for investigation of a representation dispute involving clerical, office, station and storehouse employees of National Airlines, Inc. A second application involving employees of this carrier was received from the Radio Officers' Union, A. F. of L. (referred to herein as ROU). This application covers communications employees including radio operators, teletype operators, telephone switchboard operators and agents.

These two applications conflict in so far as operations agents are concerned and also with respect to composite jobs such as station agents or station managers, whose duties include both communications and clerical work. These applications also overlap on teletype operators and telephone switchboard operator positions.

In addition, the BRC application comprehends commissary and stockroom personnel as covered by the Board's certification of December 13, 1945, issued in Case R-1548. In that case an application was received from the International Association of Machinists (hereinafter referred to as IAM) for investigation of a representation dispute involving commissary and stockroom personnel of National Airlines, Inc. As a result, an election was conducted and the IAM was certified as the duly authorized representative of these employees.

In this dispute conflict exists between three organizations, namely, BRC, ROU and IAM, over the craft or class grouping of ground service employees, ramp agents and cargo handlers. Although such employees are covered by the applications of the BRC and ROU they are now represented by the IAM under the certification issued in R-1548 and are covered by a labor agreement between that organization and the carrier effective January 1, 1946.

R-1719—Pan American Airways, Inc.

Application was filed under date of August 10, 1946, by ROU for investigation of a representation dispute involving radio operators and teletype operators, employees of Pan American Airways, Inc. Radio operators employed by the carrier are not now represented by any labor organization. Teletype operators, however, are now represented by the BRC under a certification issued by the Board in Case R-1589 in which teletype operators were voted together with clerical, office and related employees. Due to this conflict, the ROU addressed a letter to the Board under date of October 28, 1946, withdrawing teletype operators from its application. In the interim, the craft or class question, as it involves teletype operators, had been raised in a number of cases and, pending a general settlement of the question, no action was taken on the withdrawal request of the ROU.

There are three docketed cases before the Board involving employees of Northeast Airlines, Inc., namely, R-1718, R-1720 and R-1721. Each of the three was filed by a different organization and there is overlap not only between these three applications

but also between existing labor agreements applicable to the employees involved.

R-1718—Northeast Airlines, Inc.

Application in this case was filed by the Transport Workers Union of America, CIO (hereinafter referred to as TWU) for investigation of a representation dispute involving cargo, commissary, and stockroom personnel, employees of Northeast Airlines, Inc. With respect to this application the carrier has no employees in cargo or commissary classifications. Instead, employees who perform cargo and commissary work are classified as fleet service personnel and, at the present time they are not represented by any labor organization.

Storekeepers and assistant storekeepers as covered by this application are included within the scope of a labor agreement effective March 15, 1946, between the carrier and the BRC.

R-1720—Northeast Airlines, Inc.

This case is based upon an application received from the ROU for investigation of a representation dispute among the following employees:

(1) Communications Department (radio operators, teletype operators and telephone switchboard operators)

(2) Operations Department, Operations Agents, Ramp Agents, Counter Agents, Station Agents, Station Managers, Asst. Station Managers and Fleet Service Employees.

Of the employees covered by its application, the ROU now represents radio operators and has an agreement effective May 1, 1946, with the carrier applicable to these employees. This agreement also includes teletype operators with a provision that application of the agreement to these employees will remain suspended until settlement of jurisdictional differences over these positions between the ROU and BRC.

R-1721—Northeast Airlines, Inc.

This case is based upon an amended application of the BRC for investigation of a representation dispute involving clerical, office, station and storehouse employees.

In addition to the employees covered by the agreement effective March 15, 1946, between the BRC and the carrier, the amended application of the BRC in this case is intended to include all employees of the carrier as may properly be classified as clerical, office, station and storehouse employees.

The BRC application comprehends teletype operators, telephone switchboard operators, cargo handlers, ground service or fleet service personnel, and cargo, commissary and storeroom personnel. With regard to these particular occupations, the application of the BRC is in conflict with the applications of the TWU and ROU as docketed in Cases R-1718 and R-1720, respectively. The BRC application also comprehends janitors and these employees are now covered by a labor agreement effective April 1, 1946, between the carrier and the IAM.

There are two docketed cases before the Board involving employees of Pennsylvania-Central Airlines, Inc., namely, R-1729 and R-1735. Both are in direct conflict with respect to claims of the applicant organizations on the craft or class groupings of the employees involved.

R-1729—Pennsylvania-Central Airlines Corp.

Application in this case was filed by the IAM for investigation of a representation dispute involving stores, stockroom and commissary clerks, cargo handlers and agents and others who receive, ship, sort, handle, distribute and do record work in connection therewith of all plane parts, tools and stock, materials or supplies, including loading, unloading, packing and handling of all cargo, mail and express.

Cargo handlers are designated on Pennsylvania-Central Airlines as Ramp Service employees. As to such employees, IAM claims only those whose main duties are handling of cargo outside on the ramps. IAM has no interest in employees whose duties are mainly inside and clerical.

Stores personnel on this carrier are now represented by the Airline Mechanics Department, UAW-CIO (hereafter referred to as UAW), under authority of a certification issued by the Board on November 20, 1945, Case No. R-1464. This organization claims that such employees constitute a separate craft or class for representation purposes under the Act.

R-1735—Pennsylvania-Central Airlines Corp.

Application in this case was filed by the BRC for investigation of a representation dispute involving clerical, office, station and storehouse employees. This application embraces all employees covered by the IAM application in R-1729 and, in addition, includes other employees of the carrier generally described as clerical, office, station and storehouse employees. Teletype operators, as covered by this application, are now represented by the Airline Communications Employees Association, ACA-CIO (hereinafter referred to as ALCEA).

Following the docketing of the several disputes outlined above, all were investigated by mediators. In no case could the contesting organizations agree

on the proper grouping of the employees involved for representation purposes under the Railway Labor Act, as amended. The Board thereupon ordered that a public hearing be held pursuant to the provisions of Section 2, Ninth, of the Act, as a necessary part of the investigation of these disputes in order to give all interested parties an opportunity to present pertinent data and argument in support of their respective positions.

Inasmuch as the craft or class issues involved are of great import to the entire air transport industry, the Board invited all major scheduled airlines to have representatives attend the hearing and state their views as to the proper craft or class groupings of airline employees involved in the cases before the Board. Other labor organizations interested in the general subject of craft or class among airline employees were also invited to attend the hearing.

The hearing was conducted by the Board in Washington, D. C., on November 13, 14, and 15, 1946, inclusive. Subsequent thereto, some of the interested organizations filed briefs. Based upon the whole record as developed by the mediators' investigations, the public hearing and such briefs as were submitted, the National Mediation Board makes the following Findings of Fact.

ISSUES

The disputed issues in these cases are of considerable importance and their disposition will set a pattern for the investigation of future representation disputes among airline employees in the occupations considered here. Primarily, the disputed issues involve Section 2 of the Railway Labor Act, as amended, and its application to airline employees. This section deals with employee representation for collective bargaining purposes and the determination of representation disputes among employees on the basis of craft or class. The basic issue presented in the several airline representation disputes here considered is how to apply the principle of representation by craft or class, which is well established in the railroad industry, to the young and growing air transport industry. Application of this principle is a duty of the National Mediation Board, under the provisions of Section 201 and 202, Title II of the Railway Labor Act, as amended.

Specifically, the issue to be resolved by the Board is how the employees involved in the various disputes shall be grouped for representation purposes under the Act. There is a considerable amount of variance in the views of the contesting organizations on this problem. Thus, it is the contention of the BRC that the craft or class of clerical, office, station and storehouse employees as established on the railroads is appropriate on airlines for employees who perform similar functions or work.[2]

[1] Record p. 21

The IAM contends that stores, stockroom, commissary and cargo employees should be considered as a group for representation purposes under the Act, separated from either mechanical employees or clerical and office employees.[3]

It is the contention of the ROU that employees should be grouped for voting purposes on each airline according to their own desires and that no uniform craft or class lines are distinguishable in the airline industry at the present time.[4]

The TWU contends that cargo, commissary and stockroom personnel should either be treated as a separate group for purposes of the Railway Labor Act or combined with airline mechanics.[5]

The ALCEA contends that radio operators and teletype operators are communications employees and should not be separated or consolidated with any other group for purposes of the Act. The ALCEA makes no contention concerning craft or class lines of other employees involved in these disputes.[6]

FINDINGS OF FACT

1. The employees involved in the several disputes here considered are employees as defined in Section one, Fifth of the Railway Labor Act, as amended. Similarly, the airlines involved in these disputes, namely, National Airlines, Inc., Northeast Airlines, Inc., Pan American Airways, Inc., and Pennsylvania Central Airlines Corporation, are carriers as defined in Section 1, First, and Section 201 of the Act.

2. The employees involved in the disputes here involved may for the purpose of considering their duties and job relationship be classified as follows:

a. *Clerical and office employees including attendants.*

The function of this group is suggested by the following representative job titles included therein—supervisory clerks, bookkeepers, accounting and statistical clerks, office clerks and clerical specialists, operations and record clerks, stenographers, secretaries and typists, office mechanical device operators such as mimeograph operators and accounting machine operators, elevator operators, telephone switchboard operators, office and office building attendants such as mail room personnel, messengers, janitors and porters.

b. *Stores employees*

[3] Record p. 51
[4] Record pp. 22, 32.
[5] Record pp. 208, 215.
[6] Record pp. 204, 261.

The function of such employees is to receive, store, issue and maintain written records pertaining to equipment, supplies, materials, merchandise and parts in a stockroom or storeroom. Generally the job titles associated with this function are stores or stock clerks, storekeepers and helpers.

c. *Fleet service employees*

Included in this group are employees who direct and check passengers at the gates and on the ramps, oversee loading and unloading of aircraft, and check weight distribution, load and unload baggage and cargo, check and supply cabin equipment and supplies for accommodation of passengers such as foods, beverages, blankets, pillows, magazines and related supplies. Representative job titles under this classification are:

Load agents or ramp agents, cargo agents, cargo clerks or cargo handlers, commissary clerks or cabin supplymen.

d. *Passenger service employees*

Included in this group are those employees who contact passengers and shippers, supplying information on service, rates, schedules and reservations, arrange for limousine transportation to and from airports, prepare and sell tickets, arrange for reservations, tag and check baggage, receive, check, bill and deliver air freight and air freight and air express shipments and prepare passenger and cargo manifests. Representative job titles under this classification are:

Reservations agents
Counter or sales agents
Passenger agents
Cargo agents
Porters and cargo handlers
Station agents
Supervisory agents and station managers

e. *Communications employees*

Include the following:

Radio operators
Teletype operators

3. In the past the Board has, on various occasions, made determinations of craft or class for employees performing the same duties and carrying the same or similar job classifications as some of the employees involved in these disputes.

On October 1, 1945, the Board issued Findings respecting craft or class in Case R-1447 involving the following employees of American Airlines, Inc.

Mechanics
Fleet Service Personnel
Stores Department Personnel
Plant Maintenance Personnel

Findings applicable to other airlines issued by the Board during October 1945, dealt with similar problems of craft or class. Other Findings were issued in the following cases:

R-1462 Colonial Airlines, Inc.
R-1464 Pennsylvania-Central Airlines Corp.
R-1471 Transcontinental & Western Air, Inc.

Principally, the issues determined in all of the above Findings pertained to the craft or class of airline mechanics. As thus determined, this craft or class includes:

A. Mechanics who perform maintenance work on aircraft, engine, radio or accessory equipment.

B. Ground service personnel who perform work generally described as follows: Washing and cleaning airplane, engine, and accessory parts in overhaul shops; fueling of aircraft and ground equipment; maintenance of ground and ramp equipment; maintenance of buildings, hangars, and related equipment; cleaning and maintaining the interior and exterior of aircraft; servicing and control of cabin service equipment; air conditioning of aircraft; cleaning or airport hangars, buildings, hangar and ramp equipment;

C. *Plant Maintenance personnel*—including employees who perform work consisting of repairs, alterations, additions to and maintenance of buildings, hangars, and the repair, maintenance and operation of related equipment including automatic equipment.

The Board's Findings in those cases were definite and conclusive with respect to the craft or class of mechanics, as outlined above. However, these cases also involved the craft or class issue for stores personnel, commissary clerks and cargo handlers. For these latter classifications the Board's Findings contained provisions for grouping such employees for voting at that time with a stipulation that such finding was made without prejudice to a later Determination of the proper craft or class to which such employees belong. Accordingly, such employees were voted in those cases as well as in subsequent instances where they have become involved in representation disputes. However, certifications which have been issued for such employees include a statement holding for future determination their proper classification for representation purposes under the law. Thus, the particular representation disputes were settled while the craft or class issue

remained open pending further progress of the employees in aligning themselves in crafts or classes as contemplated by the Act.

The discussion presented in the Board's Findings in R-1447 discussing the historical development of collective bargaining and the multiplicity of job titles on airlines is quoted as follows:

> "In the groups under consideration in Case R-1447, which presents issues similar to those in Cases R-1462, R-1464, and R-1471, the historical development indicates that, practically without exception, airline mechanics were the first occupational craft or class to be organized and covered by agreements with the air carriers. From time to time in succeeding years other groups, such as stockroom or stores personnel, plant maintenance forces, fleet service personnel, and ground service personnel secured representation and coverage by agreements. In some cases, these groups were included in agreements with mechanics. In other instances, they were covered by separate agreements. An important fact to be noted is that there is no standard classification of occupational titles and duties among airline employees, such as exists on the rail carriers. Therefore, job titles for the same kind of work are almost as varied as the number of operating air lines. One airline may have a classification known as commissary clerks, which on another the duties of such jobs would be performed by ground service personnel, or utility workers."

4. Although there has been some development in collective bargaining among the airline employees here involved since October 1, 1945, when the Board's Findings in R-1447 were issued, there still is a great amount of variance in the scope of agreements in the industry. A list of labor agreements applicable to these occupations is presented in Appendix A attached hereto and made a part hereof.

Although fleet service employees and storeroom personnel were discussed in the previous Findings, clerical, office and related employees, radio operators and teletype operators were not then involved. In these latter two categories there has been considerable development in collective bargaining since that time. While there is some uniformity in the scope of agreements applicable to radio and teletype operators, the same cannot be said for clerical, office and related employees. Thus, of the 9 airlines where agreements are in effect for radio and teletype operators, 7 have both occupations covered by the same agreement. On one airline there is an agreement applicable to radio operators but none for teletype operators. On another airline separate labor agreements are in effect for these two occupations.

Only two airlines have agreements applicable to clerical, office, and related employees. One of these (Pan American Airways) covers clerical, office and related employees, except stockroom clerks, on the entire system; while on the other (Northeast Airlines), the agreement is confined to clerical, office and related employees in the general office.

Closely related to the category of clerical, office and related employees are "agents", a designation generally used on airlines for employees engaged in making reservations, selling tickets and dealing with the public respecting travel accommodations. One airline, Transcontinental & Western Air, has an agreement covering operations agents, passenger agents, station agents and cargo handlers, and North-West Airlines has an agreement covering transportation agents. A third airline, Mid-Continent, has an agreement applicable to station managers.

5. On practically all of the nation's railroads the craft or class of clerical, office, station and storehouse employees, are covered by labor agreements. On approximately 99 percent of the railroads this craft or class is represented by the Brotherhood of Railway and Steamship Clerks.

This high degree of uniformity is in direct contrast to the situation on scheduled airlines where, as shown in Appendix A, there is a great amount of variance in the extent comparable airline employees are covered by labor agreements.

The craft or class of clerical, office, station and storehouse employees, as presently established on the railroads, is chiefly based upon the scope of an agreement, effective January 1, 1920, between the BRC and the Director General of Railroads who at that time operated all railroads for the government. The scope of that agreement was as follows:

> "Employees affected.—Rule 1. These rules shall govern the hours of service and working conditions of the following employees on railroads in Federal operation, subject to the exceptions noted below:
>
> (1) Clerks.
>
> (2) Other office and station employees, such as office boys, messengers, chore boys, train announcers, gatemen, checkers, baggage and parcel room employees, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, elevator operators, office, station and warehouse watchmen, and janitors.
>
> (3) Laborers employed in and around stations, storehouses, and warehouses."

Although the above so-called national agreement was later abrogated, it established the basis of the craft or class which in later years, since enactment

of the Railway Labor Act, has generally come to be known as clerical, office, station and storehouse employees. As presently established on the railroads, this craft or class embraces innumerable job titles which are generally classified for reporting purposes to the Interstate Commerce Commission as follows:

Supervisory or chief clerks
Assistant chief clerks
Supervisory cashiers
Clerks and clerical specialists
Office mechanical device operators
Stenographers
Secretaries
Typists
Ticket agents
Assistant ticket agents
Telephone switchboard operators
Office assistants
Messengers and office boys
Elevator operators and other office attendants
Watchmen
Claim agents and Claim investigators
Motor vehicle and motor car operators
Janitors and cleaners
Foremen in storerooms, ice, reclamation and timber treating plants
Stationmasters and assistants
Baggage, parcel room and station attendants
Foremen of freight stations, warehouses, grain elevators and docks
Callers, loaders, scalers, sealers, and perishable freight inspectors
Truckers and laborers (station warehouses and platforms).

DISCUSSION

The applicable portions of the Railway Labor Act, as amended, in this situation stem from Sections 201 and 202 thereof which are:

> Section 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.
>
> Section 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in section 1 thereof.

By the above provisions of the law the National Mediation Board is authorized to investigate representation disputes among airline employees as provided by section 2, ninth, quoted in part as follows:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election."

In designating who may participate in elections, section 2, fourth, provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this Act." In providing that the majority of any craft or class shall have the right to determine representation the law clearly requires the Board to designate who may participate in elections on the basis of craft or class.

The BRC has advanced the view that because the Railway Labor Act was amended to cover airlines the same craft or class treatment on rail lines should be followed on airlines. Thus, it is claimed that the craft or class of railroad clerical, office, station and storehouse employees should also be followed in designating comparable airline employees. Such considerations fail to take into account the differences between railroads and airlines in operating problems and conditions, duties of employees, job titles and job relationships. While both are transportation industries the simple fact that planes fly in the air makes for numerous operational problems which are not present on railroads. This in no way minimizes railroad operational problems but is pointed out to show that because a pattern of craft or class is followed on the railroads does not necessarily mean that this same pattern should apply on the airlines. Other factors must be considered.

In these cases, as in all others, where disputes arise over the question of craft or class the Board gives considerations to all relevant elements most important of which is the intent of the Railway Labor Act in settling disputes and promoting stable labor relations. Individual cases require consideration of facts peculiar to particular situations, but, in addition, there are general factors to be considered. These include the composition and relative permanency of employee groupings along craft or class lines on carriers generally as well as on particular carriers. The extent and effectiveness of past collective bargaining arrangements, the functions, duties and responsibilities of the employees, the general nature of their work and the community of interest existing between jobs are other factors considered. Previous decisions of the Board which bear upon the issues of the particular dispute are also taken into account.

If airline employees in jobs comparable to those in the craft or class of railroad clerical, office, station and storehouse employees fulfill these essential considerations of craft or class, then it follows that such an airline craft or class can be determined. On the other hand, if these considerations are not fulfilled, a different determination of craft or class for airline employees would be in order.

The commercial airline industry is relatively new and has grown rapidly since its birth some twenty years ago. While there has been considerable development in collective bargaining in this field, there is but little uniformity among the several major airlines in the manner employees in the occupations here involved have aligned themselves for collective bargaining purposes. In the hearings conducted by the Board each of the six labor organizations participating held different views as to which employees belong to what craft or class. The airlines representatives who supplied information during the hearing also held varying views as to the proper craft or class alignments of the employees. This multiplicity of views is reflected in the varying scopes of labor agreements currently in effect applicable to these employees.

Except for radio operators and teletype operators, the variance in airline labor agreement coverage and existing collective bargaining arrangements provides scant assistance in determining proper class or craft designations of employees to be voted in the various cases here considered. In these occupations, however, there is only one airline having separate labor agreements for radio operators and teletype operators. Moreover, evidence developed during the hearings shows the close relationship between these two occupations. In five elections[1] conducted by the Board among such employees on various airlines the duties of these two occupations were found to be closely related and thus they were combined for voting purposes. It has been shown that frequently individual employees qualify for both jobs and, on occasion, as the service requires, shift from one job to the other. In addition, where conditions prevent voice communication between aircraft in flight and ground radio operators messages are relayed by teletype to other ground stations where conditions are more favorable to radio communication with the plane in flight.

The dispute over the proper grouping of radio operators and teletype operators is confined to two organizations, namely, ROU and ALCEA. The contentions of the former that each airline should be considered individually appears to be on the grounds of expediency rather than on the basis of the close relationship between the duties and responsibilities of these two jobs.

The ROU, in Cases R-1706 and R-1721, has contended that telephone switchboard operators should be combined with radio operators and teletype operators for voting purposes on the grounds that all are communications employees. The BRC, on the other hand, contends that telephone switchboard operators should be combined with clerical and office employees for voting purposes. Investigation of this point shows considerable difference in the training and responsibility required of telephone switchboard operators as compared to radio and teletype operators. Whereas the latter employees are responsible for actually transmitting communications, telephone switchboard operators merely operate a board and thus make connections for other persons to communicate. Radio and teletype operators are normally a part of every airline operations office, working alongside flight dispatchers and other operations personnel. Telephone switchboard operators may be located some distance from operations offices. Where a training period of several weeks is required of radio and teletype operators it usually takes no more than a few hours to learn the operation of a telephone switchboard. Moreover, radio operators and teletype operators are often required to use code symbols in communications, a responsibility not required of telephone switchboard operators. On the basis of these considerations the Board views the work of a telephone switchboard operator to be more closely related to that of other office employes, such as mimeograph operators or other office equipment operators, than to radio and teletype operators.

The ROU contends that no hard and fast rules of craft or class should be made for airline employees because this is a young and growing industry. Such application of the craft or class principle would not serve to stabilize labor relations on the airlines but instead would make for a continuous round of elections with a different grouping of employees each time to conform to the current contentions of contesting organizations. This would result in one grouping on one airline and some other grouping on another carrier. The craft or class provisions of the law cannot be interpreted to mean one thing on one airline and something else on another if labor rela-

[1] R-1625—Western Airlines; R-1630-PCA; R-1634-Inland Airlines; R-1636-Braniff Airways; R-1640-Northwest Airlines.

tions are to be stabilized in the industry as contemplated by the law.

The ROU contends that employees themselves should be allowed to determine craft or class. Although the law provides that the majority of employees in a craft or class shall have the right to determine representation, there is nothing in the law to determine craft or class, and for the reasons cited here such a provision would be impractical. It should be noted that the ROU contention argues for expediency and confirms in each instance to the particular groups of employees from which ROU has obtained authorizations. This view overlooks the fact that other contesting organizations which have obtained authorizations in these same cases contend that the employees desire a different grouping for election purposes under the law.

There is no dispute between the contesting organizations and the airlines who participated in the hearing over including clerical and office employees and office attendants (see item 2—Findings of Fact) in a single group for voting purposes under the law. While there is but little by way of past collective bargaining relationships for such employees to serve as a guide, the community of interest which exists among such employees is generally recognized.

The dispute between the contesting organizations in these cases arises with respect to the following groups of employees as they are classified in item 2 of the Findings of Fact:

Stores employees
Fleet service employees
Passenger service employees

Each of these groups is discussed in turn as follows:

Stores employees—On eight airlines there are labor agreements in effect which include stores employees together with airline mechanics. However, in three of these agreements (Colonial, Mid-Continent and National) stock clerks are set aside from mechanics as a separate group. On six other airlines labor agreements covering stores employees are entirely separated from mechanics agreements. On two of these latter lines stores, commissary and cargo employees are all included in the same agreement. Varying views of the contesting labor organizations on the proper craft or class alignment of stores employees have already been reviewed. The airlines participating in the hearing are also in disagreement on this point.

The function of stores employees is to receive, issue, check, store and inventory supplies. Discharging this function requires such employees to prepare and maintain detailed records and reports. Essentially, these are the functions of clerical employees. With respect to the craft or class issue as it affects these employees the Board still holds the same view as was expressed in Findings issued in R-1447, quoted as follows:

> "The duties of stock clerks are not mechanical in nature. Their entire time is spent in the stockrooms classifying and maintaining supplies of the various parts and equipment in the material racks and bins, receiving incoming shipments of parts and material, disbursing such supplies to mechanics for use in maintenance operations, maintaining records of such issues, and taking periodical inventories of parts and material on hand. On most of the airlines, a tool room is maintained, where certain machine tools used by the mechanical force are kept and maintained in proper working condition. This tool room repair work is commonly performed by stores department employees. However, the tool room work is generally only a small part of the duties performed by stores personnel in receiving, classifying, maintaining and issuing the stocks of parts, materials and supplies used by the mechanical forces. The stores employees are not mechanics, and do no work incident to the actual maintenance of aircraft and equipment. Every indication therefore points to the consideration of stores personnel, or stock clerks, as employees part of a larger craft or class for the purposes of the Act, such as the craft or class of clerical, office, station and storehouse employees, not in issue here."

Evidence developed during the hearings indicated that in some instances attendants assigned to tool rooms are required to maintain and make minor repair to tools in addition to the other duties of receiving, issuing and making records of tools, parts and supplies. Where such situations are encountered the proper craft or class assignment for the employee can be determined by checking the preponderance of time usually devoted to the two kinds of work. Only if such check shows a major portion of time devoted to tool repair and maintenance should the employee be assigned to the craft or class of airline mechanics.

Fleet Service employees—As summarized in item 2 of the Findings of Fact this group embraces employees who direct and check passengers on the ramp, oversee loading and unloading of aircraft and check weight distribution, load and unload baggage and cargo, check and supply cabin equipment and supplies for the accommodation of passengers. Following are representative job titles which suggest functions rather than attempt to exhaust the list which varies considerably among various airlines:

Load agents or ramp agents
Cargo agents, cargo clerks or cargo handlers
Commissary clerks or cabin supplymen

Gen- [illegible] the duties of these employees on the

ramps are distinguished from those of ground service employees who perform the functions set forth in item 3 of the Findings. The functions of ground service are related to the mechanical service and maintenance and cleaning of aircraft, equipment, and hangars. By contract the functions of fleet service employees are operational and are of a non-mechanical nature.

The functions of a ramp agent or load agent requires a knowledge of all phases of ticket procedure and air cargo forms and details. Knowledge and application of safety regulations in loading operations are also required. The functions of cargo handler (or fleet service agent as they are called on some airlines) involve the physical loading of mail, express, baggage and other cargo. In this respect these functions are supplemental to those of the ramp agent. This is demonstrated by the fact that the usual lines of promotion progresses from cargo handler to ramp agent. Incidental to loading and unloading operations performed by such employees are the preparation and checking of passenger and cargo manifests.

Closely related to the function of ramp agents and cargo handlers are the commissary clerks or cabin supplymen. Where the former load and unload passengers and cargo the latter check, load and unload various supplies and equipment for accommodations of passengers such as food, beverages, magazines, seat-covers, blankets, etc. This work requires checking, preparing records, receiving and returning to stores or commissaries equipment and supplies loaded and unloaded from aircraft. Discharging these functions requires a close working relationship between commissary clerks or cabin supplymen and stores personnel.

The community of interest between fleet service employees has been shown but the question of whether they constitute a separate craft or class or are a part of another craft or class is yet to be examined. The IAM and TWU contend that such employees constitute a separate craft or class apart from clerical and office employees. This view overlooks the essential clerical characteristics of these jobs which are demonstrated by such common job titles among these employees as cargo clerk, commissary clerk.

In R-1729, the PCA case, the IAM application covers stores, commissary and commissary clerks, cargo handlers and agents. On this carrier cargo handlers are designated as ramp service employees and in connection with these workers the IAM claims only those whose main duties are handling cargo outside on the ramps. No claim is made for those employees whose duties are inside and mainly clerical.

This view fails to take into account the fact that the loading and unloading of passengers, mail, express, baggage and other cargo is a continuous process requiring records, tickets, tags, bills of lading, manifests from the time received in the initial airline office until delivery is completed at the destination airline office. Such a division would separate employees working side by side and would require checking the time of many inside employees performing work involving both clerical duties and the physical handling of cargo to determine in which craft or class they belong. Such a division is impractical in that it will create jurisdictional disputes and will not promote stable labor relations as contemplated by the Act.

In this connection the following is quoted from page 16 of a report of the Board published in May 1940 entitled "The Railway Labor Act and the National Mediation Board:

> "When first confronted with these problems, the Board attempted to avoid any general ruling, but to decide each case on the basis of the facts developed by the investigation of that case. After some decisions had been made, however, separating certain groups of employees, insistent demands were made that the Board follow the same rulings in subsequent cases, and other groups of employees within a class or craft insisted that they too were entitled to separation as distipct crafts.
>
> On the basis of its experience in dealing with these problems, the Board is impressed that the tendency to divide and further subdivide established and recognized crafts or classes of employees has already gone too far, and threatens to defeat the main purposes of the Railway Labor Act, namely, the making and maintaining of agreements covering rates of pay, rules, and working conditions and the avoidance of labor disputes. Moreover, the Board has been informed by carrier managements in some cases that such subdivisions tend to interfere with the efficiency of operations.
>
> The Board is inclined, therefore, to avoid unnecessary multiplication of subcrafts or subclasses, and to maintain, so far as possible, the customary groupings of employees into crafts or classes as they have been established by accepted practice over a period of years in the making of wage and rule agreements."

Passenger Service employees—As outlined in item 2 of the Findings, included in this group are employees who provide most of the contact with passengers and shippers in arranging for air transportation. The term "agent" is generally used by airlines to designate various representative jobs in this category. As for example, reservation agents, ticket agents, counter or sales agents, cargo agents and station agents. Accordingly, such employees as covered by the ROU applications in R-1706 and R-1720 are collectively referred to as agents or operations

agents. Also included in these applications are ramp agents and cargo agents which were discussed under the heading of Fleet Service employees. The BRC applications in R-1706, R-1721 and R-1735 include these employees under the general craft or class designation of clerical, office, station and storehouse employees.

The function of these variously designated agents is continuous and related from the time the airline representative receives first contact from the prospective customer until he has purchased transportation and is ready to emplane, or in the case of air cargo, until the shipment is turned over to the airline for transportation. A review of the duties of such employees illustrates both the essential clerical nature of their jobs as well as their relation to fleet service employees. The duties typically performed by passenger service employees are:

1. Answer telephone calls directed to reservation offices by passengers and the traveling public who call to request space on airplanes and to obtain information related to airplane schedules, itineraries, fares and tariffs, travel regulations and related information.

2. Quote fares, schedules, travel regulations and related travel information, and acknowledge and confirm space, referring to printed schedules, tariff and fare tables, and related written sources.

3. Record passengers' names, destinations, itineraries and related information essential to maintaining and preserving a written record of all airplane space booked and/or requested, and forward such information to other stations.

4. Prepare tickets, accept payment for tickets, and prepare written reports of all ticket sales transactions.

5. Prepare passenger manifests, tag baggage, and perform related clerical duties incident to checking in passengers for flights.

6. Oversee the loading of limousines to transport passengers to airports, and prepare and forward limousine load dispatches to airport ticket offices via telephone or teletype.

7. Meet arriving limousines from City Ticket Offices, and direct passengers to "check-in" counters or to loading gates to airplanes.

8. Announce over public-address systems the arrival and departure times of airplanes.

9. Oversee the emplaning and deplaning of passengers to departing and from arriving airplanes by checking and counting passengers passing through ramp gates, inspecting tickets; and directing passengers to proper airplanes on the ramp.

At large stations there is considerable subdivision of the above functions, each being performed by a separate employee. At smaller stations, fewer employees performing composite duties, discharge these functions and in the smallest station there may be not more than one or two employees for the entire operation. These are composite workers in the truest sense and are usually designated as station agents. The ROU has claimed such employees on the grounds that they are normally required to have a voice radio license. Inasmuch as ability to operate a radio represents their highest skill, these employees should be grouped with radio operators for voting purposes, according to the ROU.

The claim that ability of such an employee to operate a radio is his highest skill is open to serious question when it is considered that he may also be required to discharge all of the other functions reviewed under the nine items above.

The similarity between functions performed by railroad workers in the craft or class of clerical, office, station and storehouse employees are closely similar to those described herein under the heading of:

a. Clerical and office employees including office attendants
b. Stores employees
c. Fleet service employees
d. Passenger service employees

A review of the job titles in the railroad craft or class as given in item 4 of the Findings of Fact illustrates this similarity.

While the operational problems of airlines are vastly different from those on railroads, both are branches of the transportation industry. As such, both are organized operationally to serve the public in the transportation of passengers, baggage, mail, express and freight. For these reasons it is not surprising to find marked similarity in jobs in the two branches. For instance, the duties of a railroad ticket agent are quite similar to those of an airline counter agent or sales agent. For general clerical workers there is difference only in the details of the respective jobs; there is no difference in the essential nature of such work on railroads and airlines. The same may be said for stores employees. Whereas on airlines there are cargo handlers or fleet service agents, their counterparts can be found on the railroads as baggage agents, callers, loaders and truckers. On railroads such employees are a part of the craft or class of clerical, office, station and storehouse employees. Although it includes employees of varying skills and abilities ranging from the highest type of technical clerical workers down the scale to

janitors and laborers, experience has shown the craft or class to provide a basis of stable labor relations.

CONCLUSION

On the basis of the entire record the Board finds that the employees involved in the various representation disputes constitute two separate crafts or classes as follows:

1. Radio operators and teletype operators

2. Clerical and office employees including office attendants, stores employees, fleet service employees and passenger service employees as generally described under item 2 of the Findings of Fact.

For general identification purpose this craft or class may be designated as clerical, office, stores, fleet and passenger service employees.

R-1706—National Airlines, Inc.

The Board finds that a dispute exists among the craft or class of clerical, office, stores, fleet and passenger service employees of this carrier and directs that a mediator be assigned to conduct a ballot box election using an eligible list prepared by him from the carrier's records and based upon this Determination.

R-1719—Pan American Airways, Inc.

The ROU has not presented a sufficient number of authorizations signed by employees in the craft or class of radio operators and teletype operators to justify a finding under the law that a dispute exists among this craft or class. The application of the ROU is therefore dismissed without prejudice to the organization filing a new application when a sufficient number of authorizations is obtained.

R-1718—Northeast Airlines, Inc.

Application of TWU covers cargo, commissary and stockroom personnel which the Board finds are only a part of the craft or class of clerical, office, stores, fleet and passenger service employees. The application is therefore dismissed.

The authorizations submitted by the TWU in this case will be considered by the mediator assigned to conduct an election in Case R-1721 for the purpose of determining whether the name of this organization should be printed on the ballot.

R-1720—Northeast Airlines, Inc.

The Board finds that a dispute exists among the craft or class of radio operators and teletype operators of this carrier and directs that a mediator be assigned to conduct a ballot box election using an eligible list prepared by him from the carrier's records and based upon this Determination.

Application of the ROU also covers telephone switchboard operators, ramp agents, counter agents, station managers, assistant station managers and fleet service employees, all of which the Board finds to be a part of the craft or class of clerical, office, stores, fleet and passenger service employees. This portion of the application is therefore dismissed.

The authorizations submitted by the ROU in this case will be considered by the mediator assigned to conduct an election in Case R-1721 for the purpose of determining whether the name of this organization should be printed on the ballot.

R-1721—Northeast Airlines, Inc.

The Board finds that dispute exists among the craft or class of clerical, office, stores, fleet and passenger service employees of this carrier and directs that a mediator be assigned to conduct a ballot box election using an eligible list prepared by him from the carrier's records and based upon this Determination.

R-1729—Pennsylvania-Central Airlines Corp.

Application of the IAM covers stores, stockroom and commissary clerks, cargo handlers and ramp service employees whose main duties are handling cargo outside on ramps, all of whom the Board finds to be only a part of the craft or class of clerical, office, stores, fleet and passenger service employees. The application is therefore dismissed.

The authorizations submitted by the IAM in this case will be considered by the mediator assigned to conduct an election in Case R-1735 for the purpose of determining whether the name of this organization should be printed on the ballot.

R-1735—Pennsylvania-Central Airlines Corp.

The Board finds that a dispute exists among the craft or class of clerical, office, stores, fleet and passenger service employees of this carrier and directs that a mediator be assigned to conduct a ballot box election using an eligible list prepared by him from the carrier's records and based upon this Determination.

By order of the
NATIONAL MEDIATION BOARD.

(s) ROBERT F. COLE, Secretary.

APPENDIX "A"

Labor Agreements on major airlines covering mechanics, clerical and related employees, radio operators and teletype operators.

American Airlines

1. Agreements with TWU effective Sept. 15, 1946, covers:

   Mechanics, plant maintenance, fleet service and ground service employees

2. Agreement with TWU effective November 1, 1946, covers:

   Stock clerks

3. Agreement with ALCEA effective Oct. 1, 1946, covers:

   Radio operators and teletype operators.

American Overseas Airlines, Inc.

1. Agreement with UAW effective Dec. 8, 1945, covers:

   Mechanics, ground service employees, tool crib attendants, stores personnel, fleet service personnel and cleaners.

   Note: As a result of election in R-1668, TWU certified on August 30, 1946, to represent:

   a. Mechanics
   b. Stockroom clerks
   c. Cafeteria personnel
   d. Chauffeurs and truck drivers

2. Agreement with Flight Pursers and Stewardesses Assn. effective Sept. 23, 1946, covers:

   Commissary clerks.

3. Agreement with UAW effective Jan. 19, 1946, covers:

   Chauffeurs and truck drivers

   Note: See certification in R-1668 noted above.

Braniff Airways, Inc.

1. Agreement with UAW effective Jan. 1, 1945, covers:

   Mechanics, stock clerks, ground service employees and cleaners

2. Agreement with ALCEA effective Sept. 4, 1946, covers:

   Radio operators and teletype operators

Colonial Airlines, Inc.

1. Agreement with UAW effective Aug. 1, 1942, covers:

   Mechanics, commissary clerks and stock clerks

   Note: As a result of election in R-1462, IAM certified on Nov. 9, 1945 to represent:

   a. Mechanics
   b. Stores personnel

Chicago & Southern Airlines, Inc.

1. Agreement with UAW effective Jan. 1, 1946, covers:

   Mechanics and stock clerks

Continental Airlines, Inc.

1. Agreement with UAW effective May 1, 1946, covers:

   Mechanics, cleaners, janitors, maintenance cost clerks and stock clerks

Delta Airlines, Inc.

1. Agreement with UAW effective Jan. 1, 1938, covers:

   Mechanics

Eastern Airlines, Inc.

1. Agreement with IAM effective Oct. 10, 1945, covers:

   Mechanics, stock clerks and commissary clerks

   Note: As a result of check of authorizations R-1617, IAM also certified on May 10, 1946, to represent cargo handlers.

Inland Airlines, Inc.

1. Agreement with UAW as amended Jan. 1, 1945, covers:

   Mechanics

   Note: As a result of election in R-1657, IAM also certified on July 17, 1946, to represent cargo, commissary and stockroom employees.

2. Agreement with ALCEA effective July 2, 1946, covers:

   Radio operators and teletype operators

Mid-Continent Airlines, Inc.

1. Agreement with UAW effective Jan. 1, 1946,

covers:

Mechanics, stores department personnel, watchmen, cleaners, stock handlers and storekeepers

2. Agreement with ALCEA effective Oct. 8, 1942, covers:

Radio operators

3. Agreement with ALCEA effective March 1, 1943, covers:

Station Managers

Note: As result of election R-1456 Mid-Continent Airline Station Managers Association certified on Aug. 25, 1945 to represent station managers

National Airlines, Inc.

1. Agreement with IAM effective Jan. 1, 1946, covers:

Mechanics, stock clerks, cleaners and ground service employees

Note: This agreement made following election R-1548 as result of which IAM certified on Dec. 13, 1945 to represent:

a. Mechanics
b. Commissary & stockroom employees
c. Unskilled employees

Northeast Airlines, Inc.

1. Agreement with BRC effective March 15, 1946, covers:

Clerical and related employees in general office

2. Agreement with IAM effective April 1, 1945, covers:

Mechanics and cleaners

3. Agreement with ROU effective May 1, 1946, covers:

Radio operators and teletype operators with a provision that applicability of agreement to teletype operators will remain in suspense until jurisdictional dispute is settled between BRC and ROU.

Northwest Airlines, Inc.

1. Agreement with IAM effective Sept. 6, 1946, covers:

Mechanics

By a supplement signed on Oct. 7, 1946, this agreement made applicable to stock clerks, janitors and janitresses.

Note: Original agreement made following election in R-1544 which resulted in IAM being certified on Feb. 21, 1946 to represent mechanics. In a later case, R-1643, another election resulted in IAM being certified on July 22, 1946 to represent:

a. Stores and stockroom employees
b. Unskilled employees.

2. Agreement with ALCEA effective June 1, 1946 covers:

Radio operators and teletype operators

3. Agreement with BRC effective September 1, 1946 covers:

All reservations agents, transportation agents, senior transportation agents, senior transportation agents in charge and reservations supervisors (Senior control agents).

Pan American Airways, Inc.

1. Agreement with BRC effective Jan. 1, 1947, covers:

Clerical, office and related employees

2. Agreement with TWU effective Dec. 18, 1945, covers:

Mechanics and ground service employees in shops and hangars: (includes cleaners, janitors, porters, maids, laborers, cargo handlers, watchmen and chauffeurs)

3. Agreement with IAM effective Dec. 7, 1945, covers:

Stock clerks

Note: Agreements with TWU and IAM made following election in R-1451 which resulted in TWU being certified to represent:

a. Mechanics
b. Unskilled workers and IAM being certified to represent
c. Stockroom personnel

Pennsylvania-Central Airlines Corp.

1. Agreement with United Transport Service Employees of America, effective July 17, 1945, covers:

Janitors in hangars, buildings and offices, and general services connected therewith

2. Agreement with IAM effective June 1, 1946, covers:

Mechanics

3. Agreement with UAW effective Jan. 1, 1946, covers:

   Stores personnel

   Note: As result of election in R-1464 UAW was certified on Nov. 20, 1945, to represent stores personnel

4. Agreement with ALCEA, effective June 1, 1946, covers:

   Radio operators and teletype operators

Transcontinental & Western Air, Inc.

1. Agreement with IAM effective Jan. 1, 1946, covers:

   Mechanics, fleet service helpers and ground service helpers

2. Agreement with IAM effective Aug. 1, 1946, covers:

   Stores clerks, commissary clerks and cargo agents

3. Agreement with Skyline Association of Radio Operators signed June 20, 1945, covers:

   Radio operators

4. Agreement with Skyline Assn. of Radio operators signed Aug. 9, 1946, covers:

   Teletype operators

5. Agreement with Association of Passenger Agents of TWA, Inc., effective July 1, 1943, covers:

   Operations agents, passenger agents, station agents and cargo handlers

United Air Lines, Inc.

1. Agreement with IAM effective Dec. 1, 1945, covers:

   Mechanics

2. Agreement with Air Transport Employees Union, Dist. 50, UMWA effective Jan. 1, 1946, covers:

   Storekeepers, stock clerks, cargomen, cargo clerks, cargo handlers, janitors, cleaners and utility employees

Western Air Lines, Inc.

1. Agreement with UAW as amended effective Jan. 7, 1945, covers:

   Mechanics

2. Agreement with UAW effective Feb. 16, 1942, covers:

   Stock clerks, cargo clerks and fleet service men

3. Agreement with ALCEA effective July 2, 1946, covers:

   Radio operators and teletype operators.

Printed in U. S. A.

Filed Mar 22 1948

36 **Exhibit No. 2.**

February 7, 1947
Case No. R-1735

AIR MAIL

Mr. Willard S. Townsend, Int'l. President
United Transport Service Employees of America
3452 South State Street
Chicago 16, Ill.

Dear Mr. Townsend:

This is to advise that the Board has docketed as Case No. R-1735 an application from the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, for investigation of a representation dispute involving clerical, office, station and storehouse employees of the Pennsylvania-Central Airlines Corporation.

As a result of this and other airline representation disputes the Board, on January 31, 1947, issued a Determination of Craft or Class, a copy of which is enclosed for your information. As you will note, the craft or class covering employees embraced in the application referred to above is designated as "clerical, office, stores, fleet and passenger service employees."

It is noted that your organization has a labor agreement effective July 17, 1945, with the Pennsylvania-Central Airlines covering janitors in hangars, buildings and offices, and general services therewith. Inasmuch as it appears that some of the employees covered by this agreement may be involved in the election which has been ordered by the Board in this case, you are hereby advised that Mr. T. E. Schoonover, Mediator, will be in the offices of the Board, Federal Works Agency Building, 18th & F Sts., N.W., Washington, D. C., on Tuesday, February 11, 1947, for the purpose of investigating this dispute.

I should appreciate it if you will advise promptly who will represent your organization in this matter.

Very truly yours,

ROBERT F. COLE,
Secretary.

Enclosure
4-mld

37 Filed Mar 22 1948

Exhibit No. 3.

LAW OFFICES
COBB, HOWARD & HAYES
613 F STREET, NORTHWEST
WASHINGTON, D. C.

February 13, 1947
Re: Case R-1735

Mr. Robert F. Cole, Secretary
National Mediation Board
Washington 25, D. C.

Dear Sir:

Your air-mail letter of February 7, 1947 addressed to Mr. Willard S. Townsend, International President of the United Transport Service Employees of America reached Mr. Townsend on Wednesday, February 12, 1947. The letter went to Chicago, and Mr. Townsend was in Washington at the time. A telegram from his office on Tuesday February 11th gave him some indication of the hearing to be had on February 12th, which incidentally might involve the representation of his organization of "janitors in hangars, buildings and offices, and general services therewith." On Tuesday last, February 11th, upon receipt of the telegram Mr. Townsend immediately, notwithstanding that he was engaged in another matter of moment with which he is connected and for which purpose he was in Washington,

got in touch with Mr. T. E. Schoonover, Mediator, and protested the incorporation of the persons his organization, the UTSEA, represented.

On behalf of Mr. Townsend and the UTSEA, as agents and attorneys we make this formal protest and respectfully request that no action be taken by the National Mediation Board affecting or altering the agreement made July 17, 1945, for several reasons, to wit:

It is to be noted that the UTSEA has a labor agreement, effective July 17, 1945 with the Pennsylvania Central Air Lines covering janitors in hangars, buildings and offices, and general services therewith. That agreement is still in force, made with the consent and at the instances of the employees doing the character of work above designated. No notice, either from the employees or the employers, or any labor organizations representing any class or craft, has indicated any dissatisfaction with the agreement already existing. It would seem, under the law, that before any modification or abrogation of an agreement could be made that there would have to be some dissatisfaction on the part of the employees or something in the nature of a dispute as to the right to represent these employees by some organization falling within the purview of the law. In this particular case there is a legal agreement of representation existing. The employees are satisfied for the UTSEA to represent them, and the UTSEA is satisfied to represent these employees. The purported notice transmitted to Mr. Townsend, International President, UTSEA, was not mailed until February 7, 1947 and received in his office on February 10th, and received by Mr. Townsend on February 12th; and he immediately notified the Board, through Mr. Schoonover, that there was no dissatisfaction on the part of the employees. Certain it is there was no sufficient notice given the organization to be properly represented at the hearing on February 12, 1947.

38 Further, we note the fact, and invite your attention to your own argument made in the matter of repre-

sentation of employees of the National Air Lines, Inc., "Determination of Craft or Class", January 31, 1947, in which, among other things, you stated (page 14)—

"The ROU contends that employees themselves should be allowed to determine craft or class. Although the law provides that the majority of employees in a craft or class shall have the right to determine representation, there is nothing in the law to determine craft or class, and for the reasons cited here such a provision would be impractical. It should be noted that the ROU contention argues for expediency and conforms in each instance to the particular groups of employees from which ROU has obtained authorization. This view overlooks the fact that other contesting organizations which have obtained authorizations in these same cases contend that the employees desire a different grouping for election purposes under the law."

It is to be noted that viewed from either position—the one taken by the Board or the one taken by the ROU, that the agreement made with the UTSEA, effective July 17, 1945, should in no wise be drawn into the discussion or dispute at the hearing which took place on February 12, 1947.

For these and many other reasons, we protest the inclusion in any certification by the National Board of employees presently covered by an agreement between the UTSEA and the Pennsylvania Central Air Lines who have made no protest as to representation and who have given to no one other than the UTSEA any authorization to act in a representative capacity for them.

Very truly yours,

COBB, HOWARD & HAYES.

/s/ JAMES A. COBB.

Filed Mar 22 1948

39 **Exhibit No. 4.**

NATIONAL MEDIATION BOARD
WASHINGTON

NOTICE OF HEARING.

Reference is made to Notices of Hearing issued by this Board under date of October 22 and 28, 1946, on the subject of the determination of craft or class of various groups of employees involved in the following representation cases on the airlines named therein:

R-1706—National Airlines, Inc.
R-1718—Northeast Airlines, Inc.
R-1719—Pan American Airways, Inc.
R-1720—Northeast Airlines, Inc.
R-1721—Northeast Airlines, Inc.
R-1729—Pennsylvania-Central Airlines, Corp.
R-1735—Pennsylvania-Central Airlines, Corp.

On January 31, 1947, the National Mediation Board issued its Determination of Craft or Class applying to the employees involved in the cases listed above. The findings in this Determination have been protested by the International Association of Machinists, which organization has made formal petition for reconsideration of the issues involved therein. A copy of letter dated February 10, 1947, from the International Association of Machinists, on the subject of "Petition for Reconsideration of Cases R-1706, R-1718, R-1719, R-1720, R-1721, R-1729 and R-1735" is attached.

A formal hearing will be held before the National Mediation Board on this petition to reconsider the findings made in the Determination of January 31, 1947. The date for this hearing cannot be fixed at this time due to vacancies existing in the membership of the Board. However, all parties concerned will be notified of the date of hearing as

soon as the two existing vacancies on the Board have been filled.

By authority of the Chairman, this eleventh day of February, 1947.

ROBERT F. COLE,
Secretary.

Filed Mar 22 1948

NATIONAL MEDIATION BOARD
WASHINGTON

Enclosure

39-A List of organizations receiving this notice:

Radio Officers' Union
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Transport Workers Union of America, CIO
International Association of Machinists, AFL
Air Line Communication Employees Association, ACA-CIO
Air Line Mechanics Department, UAW-CIO
United Transport Service Employees of America, CIO

List of carriers receiving this notice:

National Airlines, Inc.
Northeast Air Lines, Inc.
Pan American Air Lines, Inc.
American Airlines, Inc.
Colonial Airlines, Inc.
Pennsylvania-Central Airlines Corporation
Transcontinental & Western Air, Inc.
American Overseas Airlines
Braniff Airways, Inc.
Chicago & Southern Air Lines, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.

Inland Air Lines
Mid-Continent Airlines, Inc.
Northwest Airlines, Inc.
United Air Lines Transport Corp.
Western Air Lines, Inc.

cc:
Airlines Negotiating Conference Committee

40 Filed Mar 22 1948

NATIONAL MEDIATION BOARD
WASHINGTON

NOTICE OF HEARING.

Reference is made to notice issued by this Board on February 11, 1947, stating that a formal hearing will be held before the National Mediation Board on petition filed by the International Association of Machinists to reconsider the findings made in the Determination of January 31, 1947, on Cases R-1706, R-1718, R-1719, R-1720, R-1721, R-1729 and R-1735.

Notice is hereby given that the above mentioned hearing will be held commencing at 10:00 A.M., Eastern Standard Time, Thursday, April 17, 1947, and extending through Friday, April 18, 1947, if necessary, in Conference Room C, United States Department of Labor Building, 14th and Constitution Avenue, N. W., Washington, D. C.

Since the application filed by the International Association of Machinists requests reconsideration of only those cases involving representation of Storeroom, Cargo and Commissary employees, the hearing will be restricted to reconsideration of findings already issued in the following cases:

National Airlines, R-1706.
Northeast Airlines, R-1718.
Northeast Airlines, R-1720 (only in-so-far as the clerical, stores, and fleet service employees are concerned).
Northeast Airlines, R-1721.

Pennsylvania-Central Airlines, R-1729.
Pennsylvania-Central Airlines, R-1735.

By order of the National Mediation Board, this 1st day of April, 1947.

ROBERT F. COLE
Secretary

List of organizations receiving this notice:

Air Line Communication Employees Association, ACA-CIO.
Air Line Mechanics Department, UAW-CIO.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
International Association of Machinists, AFL.
Radio Officers' Union.
Transport Workers Union of America, CIO.
United Transport Service Employes of America, CIO.

41 **Notice of Hearing**

List of carriers receiving this notice:

American Airlines, Inc.
American Overseas Airlines.
Braniff Airways, Inc.
Chicago & Southern Air Lines, Inc.
Colonial Airlines, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Inland Air Lines
Mid-Continent Airlines, Inc.
National Airlines, Inc.
Northeast Air Lines, Inc.
Northwest Airlines, Inc.
Pan American Air Lines, Inc.
Pennsylvania-Central Airlines Corporation.
Transcontinental & Western Air, Inc.

United Air Lines Transport Corporation.
Western Air Lines, Inc.
Airlines Negotiating Conference.

42 Filed Mar 22 1948

Exhibit No. 5.

April 7, 1947

Case No. R-1735

Mr. Robert J. Wilson, Vice President
Pennsylvania-Central Airlines Corporation
National Airport
Washington, D. C.

Mr. Willard S. Townsend, Int'l. President
United Transport Service Employees of America, CIO
3452 So. State Street
Chicago 16, Ill.

Mr. Geo. M. Harrison, Grand Pres.
Brotherhood of Railway & Steamship Clerks
1015 Vine Street
Cincinnati 2, Ohio

Mr. H. W. Brown, President
Int'l. Association of Machinists
Ninth Street & Mt. Vernon Place, N.W.
Washington, D. C.

Gentlemen:

Reference is made to the Determination of Craft or Class issued by the Board on January 31, 1947, concerning the craft or class of airline employees designated by the Board as clerical, office, stores, fleet and passenger service employees.

The craft or class as thus determined includes janitors or cleaners in and around offices and office buildings but does not include such employees who work in and around hangars and repair or maintenance shops.

Investigation of the representation dispute among clerical, office, stores, fleet and passenger service employees of Pennsylvania Central Airlines Corporation has developed that janitors in hangars, buildings and offices are covered by a labor agreement effective July 17, 1945, between the United Transport Service Employees of America and the carrier. In the election conducted in this case, janitors in and around office buildings were voted and their ballots impounded pending final determination of their eligibility by the Board.

43 By inadvertence, the United Transport Service Employees of America was not provided an opportunity to participate in the hearing conducted by the Board prior to issuance of the Determination referred to above. The Board has scheduled a hearing to consider other questions with respect to the Determination and the question with respect to inclusion of janitors and cleaners in and around office buildings will be included among those considered at the hearing which is scheduled to begin on Thursday, April 17, 1947, in Conference Room "C", United States Department of Labor Building, 14th and Constitution Ave., N.W., Washington, D. C.

By order of the NATIONAL MEDIATION BOARD.

ROBERT F. COLE
Secretary

(Blind copy to James A. Cobb
613 F St., N.W., Washington)

44 Filed Mar 22 1948

Exhibit No. 6.

NATIONAL MEDIATION BOARD
WASHINGTON

Cases No. R-1706, R-1718, R-1720, R-1721, R-1729, R-1735, R-1744.

DETERMINATION OF CRAFT OR CLASS.

April 25, 1947

In the matter of
REPRESENTATION OF EMPLOYEES
of the
NATIONAL AIRLINES, INC., NORTHEAST AIRLINES, INC., PENNSYLVANIA-CENTRAL AIRLINES CORP., MID-CONTINENT AIRLINES, Clerical, office, stores, fleet and passenger service employees.

Under date of January 31, 1947, the National Mediation Board issued a Determination of Craft or Class with respect to employees involved in representation disputes on various scheduled airlines. In the Determination, the Board concluded that some of the employees involved constitute the craft or class of clerical, office, stores, fleet and passenger service employees.

Following issuance of the Determination, the International Association of Machinists, one of the labor organizations involved in the disputes, took exception to certain points in the Board's conclusions and requested reconsideration. The IAM contends that the Board erred in determining that stores, cargo and commissary employees constitute a part of the craft or class of clerical, office, stores, fleet and passenger service employees.

In order to give all interested parties an opportunity to present evidence and argument on the request for reconsideration as filed by the IAM, the Board ordered that a public hearing be held pursuant to the provisions of Section 2, Ninth, of the Act.

Pending designation of the date for the public hearing, the Board directed that elections be conducted in the representation disputes on National Air Lines (R-1706), Northeast Airlines (R-1721), Pennsylvania-Central Airlines Corporation (R-1735), and Mid-Continent Air Lines (R-1744). To protect the interests of the IAM in these elections the Board directed that two ballots would be used; one for stores, cargo and commissary employees and the other for clerical, office, fleet and passenger service employees.

In investigating the representation elections referred to in the above paragraph, the respective carrier management protested against inclusion of station managers, assistant station managers, district general managers, and district ground operations managers, on the grounds that individuals filling such positions are officials and represent the carrier in a managerial capacity at the particular point involved. In the representation elections conducted on the four airlines referred to above, the Board directed that individuals in such positions should be voted and their ballots impounded pending final determination of their eligibility. In addition, the Board directed that the question of craft or class as it applies to such positions would be considered at the public hearing originally scheduled for the IAM protest referred to previously.

45 Investigation of the representation dispute involving employees of the Pennsylvania Central Airline (R-1735) developed that janitors in and around offices and office buildings are covered by a labor agreement effective July 17, 1945, between the carrier and the United Transport Service Employees of America, CIO. Investigation also developed that this organization was not notified of the Board's hearings held previous to the issuance of the Determination of Craft or Class of January 31, 1947. Inasmuch as janitors in and around offices and office buildings were included in the craft or class of clerical, office, stores, fleet and passenger service employees under the Deter-

mination of January 31, 1947, the Board directed that the craft or class question, as it applies to janitors and cleaners in and around offices and office buildings, would be considered at the public hearing set for consideration of the other questions concerning the Determination as discussed above. Pending reconsideration of their inclusion in the craft or class of clerical, office, stores, fleet and passenger service employees, the Board directed that janitors in and around offices and office buildings of Pennsylvania Central Airlines be included in the election and their ballots impounded.

The hearing was conducted by the Board in Washington, D. C. on April 21, 1947. Based upon the whole record as developed by the public hearing, the mediators' reports of investigation, as well as the record of the original hearing held during November 1946, the Board makes the following determination:

1. *Exceptions taken by the IAM to the Board's Determination of Craft or Class of January 31, 1947.*

The Board's Determination of January 31, 1947, which holds that clerical, office, stores, fleet and passenger service employees constitute a craft or class for representation purposes under the Railway Labor Act, was based upon detailed consideration of all evidence and argument submitted by interested parties. The IAM presents no new evidence and the Board finds that the contentions of the IAM do not constitute sufficient grounds for reconsideration. Therefore, the request for reconsideration is denied and the Determination of January 31, 1947, that cargo, commissary and stockroom employees are a part of the craft or class of clerical, office, stores, fleet and passenger service employees, is confirmed. This affirmation should not be construed to prevent a reexamination of the craft or class provisions of the Railway Labor Act as applied to these categories of employees in any future airline representation disputes when, in the judgment of the Board, such reexamination will further the purposes of the Act.

2. *Inclusion of station managers and assistant station managers (as they are generally designated on different airlines) in the craft or class of clerical, office, stores, fleet and passenger service employees.*

Under the Board's Determination of January 31, 1947, airline station agents, supervisory agents and station managers were included in the craft or class of clerical, office, stores, fleet and passenger service employees. Investigation of the representation disputes on National Airlines (R-1706), Northeast Airlines (R-1721), Pennsylvania-Central Airlines (R-1735) and Mid-Continent Airlines (R-1744), and the public hearing of April 21, 1947, developed new evidence with respect to the character of the management and supervisory responsibilities of individuals in such positions which was not available to the Board on issuance of the Determination of January 31, 1947.

46 Although there is some variance among the scheduled airlines in the designation used for such positions, the title "station manager" appears to be used by a majority of the scheduled airlines. From the record there is clear indication that the duties and responsibilities of individuals in such positions are basically of an administrative and supervisory character. Individuals in such positions are required to act as the carrier's official representative in the city where stationed. This responsibility entails representing the airline before government agencies, civic associations and public groups in promotional and administrative capacities. In addition, station managers are responsible for handling the carrier's affairs at the station, including the supervision of the employees, hiring, firing, and training of workers, and for the enforcement of company rules and regulations in the conduct of operations of the station.

With respect to the contention of the airlines that station managers, or their counter parts as otherwise designated on some airlines, are "officials", the Board makes no determination. However, it is the conclusion of the Board

that the duties and responsibilities of station managers are of such a character that these positions do not constitute a part of the craft or class of clerical, office, stores, fleet and passenger service employees. The duties and responsibilities of assistant station managers do not appear to include functions of an administrative and supervisory character in sufficient amount to fall within this exception and, therefore, the Board affirms its Determination of January 31, 1947, for inclusion of assistant station managers in the craft or class of clerical, office, stores, fleet and passenger service employees.

3. Inclusion of janitors and cleaners in and around offices and office buildings in the craft or class of clerical, office, stores, fleet and passenger service employees.

Uner the Board's Determination of January 31, 1947, janitors and cleaners in and around offices and office buildings were found to be a part of the craft or class of clerical, office, stores, fleet and passenger service employees. This finding was based upon the fact that such employees perform a service function in offices and office buildings closely comparable to porters, messengers, mailroom personnel, elevator operators, telephone switchboard operators, mimeograph operators and other office machine operators. This fact is not refuted by the United Transport Service Employees of America. Instead, this organization points to the fact that janitors and cleaners in and around offices and office buildings employed by the Pennsylvania Central Airlines are colored, and are therefore not allowed to participate as full-fledged members of organizations such as the IAM and the BRC. With respect to this contention the Board has consistently held that a craft or class of employees may not be divided into two or more groups on the basis of race or color for the purposes of selecting representatives under the provisions of the Railway Labor Act. To hold otherwise would violate Section 2, Fourth, of the Act which states that the majority of a craft or class shall have the right to determine representation for the entire

craft or class for purposes of the law. Therefore, the Board affirms its Determination of January 31, 1947, which includes janitors and cleaners in and around offices and office buildings in the craft or class of clerical, office, stores, fleet and passenger service employees.

47 Conclusion

The Board directs that mediators be assigned, at the earliest practicable date, to count the ballots in the following cases in accordance with the conclusions under items 1, 2 and 3 above:

National Air Lines R-1706
Northeast Airlines R-1721
Pennsylvania Central Airlines R-1735
Mid-Continent Air Lines R-1744

By order of the National Mediation Board.

ROBERT F. COLE
Secretary

* * * * * * * * * *

OFFICIAL BALLOT
CASE NO. R-1735

Exhibit No. 7

CLERICAL, OFFICE AND PASSENGER SERVICE
EMPLOYEES OF
PENNSYLVANIA CENTRAL AIRLINES CORPORATION
MARCH 6 to 31, 1947

MARK AN "X" IN THE SQUARE OPPOSITE YOUR CHOICE
DO NOT SIGN YOUR NAME
AN "X" IN MORE THAN ONE SQUARE WILL MAKE BALLOT VOID

FILED
MAR 22 1948
HARRY M. HULL, Clerk

If you desire to be represented by
INTERNATIONAL ASSOCIATION OF MACHINISTS (AIRLINE DIVISION)
MARK AN "X" IN THIS SQUARE ____

If you desire to be represented by
BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES A.F.OF L.(AIRWAYS DIVISION)
MARK AN "X" IN THIS SQUARE ____

If you desire to be represented by
UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, C.I.O.
MARK AN "X" IN THIS SQUARE ____

If you desire to be represented by any other
ORGANIZATION OR INDIVIDUAL, WRITE NAME OF SUCH
HERE _____ AND
MARK AN "X" IN THIS SQUARE ____

SAMPLE SAMPLE SAMPLE

PURPOSE OF ELECTION

A dispute exists among the above named employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and The National Mediation Board is taking a secret ballot in order to ascertain and to certify the name or names of organizations or individuals designated to act as representatives for the purpose of the Act.

INSTRUCTIONS FOR VOTING BY MAIL

Mark an "X" in the square of your choice: place ballot in secret envelope marked "A" and seal the envelope without placing any mark of identification thereon: after sealing envelope marked "A" place it in the mailing envelope marked "BALLOT" and seal; then write your signature and your address in your own handwriting, (IN THE FORM USED BY YOU IN ENDORSING PAYROLL CHECKS) in the upper left hand corner of envelope marked "BALLOT" (WHICH WILL BE DESTROYED AFTER IT IS CHECKED AGAINST THE LIST OF EMPLOYEES VOTING BY MAIL AND BEFORE ENVELOPE MARKED "A" IS OPENED. THIS GIVES COMPLETE SECRECY).

Mail envelope marked "BALLOT" promptly so that it will reach the Post Office at Alexandria, Va., before 9:00 a.m., March 31, 1947.

BY ORDER OF NATIONAL MEDIATION BOARD.

Tedford E. Schoonover, Mediator

49 Filed Mar 22 1948

Exhibit No. 8

PROPERTY OF THE UNITED STATES GOVERNMENT
DO NOT MARK OR DEFACE THIS NOTICE OR THE ATTACHED SAMPLE BALLOTS

NOTICE OF ELECTION TO BE HELD BY THE NATIONAL MEDIATION BOARD UNDER THE RAILWAY LABOR ACT INVOLVING CLERICAL, OFFICE, STORES, FLEET AND PASSENGER SERVICE EMPLOYEES OF THE PENNSYLVANIA CENTRAL AIRLINES CORPORATION.

March 6 to 31, 1947.

To All Concerned:

A secret ballot will be taken of eligible voters on the question of representation, as submitted to The National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Section 2, Fourth, of the Railway Labor Act, as amended June 21, 1934, provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act."

Attention is called to Section 2, Railway Labor Act, providing that elections shall be free from interference, influence or coercion, etc. Also that it is unlawful for any carrier to interfere in any way with the organization of the employees, etc. Attention is also called to order No. 1, issued by the National Mediation Board on August 14, 1934, and sent to the President of the carrier in which it was ordered that "notice in re Railway Labor Act" should be posted and maintained continuously in readable condition on all the usual and customary bulletin boards.

No electioneering of any kind will be permitted within 150 feet of the polling places and the election will be conducted in such manner that interference or coercion on the part of the officers or others in a supervisory capacity will be avoided.

Reports of any violation should be made to the Mediator or to The National Mediation Board, Washington, D. C.

The rules to govern the election are as follows:

1. Time and place of election. The taking of the vote will be as nearly as possible in accordance with the attached schedule.

2. Classes or crafts involved. The employees eligible to vote shall be Clerical, Office, Stores, Fleet and Passenger Service Employees.

3. List of eligible voters. The eligible list for voting purposes in this election shall be confined to employees on the payroll of the Carrier as of January 31, 1947, who retain employee relationship with the Carrier on the date the vote is taken, and employees on authorized vacation leave or on furlough with rights to return to service. Only these employees whose names appear on such list will be permitted to vote except that upon proof of error in the list such error will be corrected.

4. The official ballot. The ballots to be used in the election have been prepared by the Mediation Board in exactly the same form as the sample ballot attached hereto and made a part of this Notice of Election.

5. Voting—Secrecy of ballot. Representative of the National Mediation Board will personally hand the ballot to each eligible voter in the voting place and see that each voter personally deposits his ballot in the ballot box. Mediator will mail ballots to eligible voters who are unable to vote in person because of location or other justifiable circumstances. No vote shall be deposited in the ballot box except in presence of a representative of the Mediation Board and party observers.

6. Supervision of election. The election will be supervised by mediators representing the National Mediation Board. They will interpret and apply the rules governing the election and decide all challenged votes. The decision shall be final as to the immediate conduct of the election, but appeal may be made to the National Mediation Board, provided that notice of such appeal is given in writing to the Mediator prior to the submission of his report of the election to the Board. Each organization that is a party to this dispute, if it so deisres, may appoint an observer to act as watcher at the voting places, to assist in distributing, collecting and counting of ballots, and in identifying voters, but observers must do no electioneering, and the Mediator may call for additional assistance where necessary for identification or other purposes. Observers will serve without liability or expense to the United States Government.

7. Report of election results. The Mediator will count and tabulate all ballots in the presence of party observers at a time and place designated by the Mediator at Washington, D. C. A report giving the results of the election will be made by the Mediator on a form perscribed by the Board and copy of this report will be furnished to the parties to the dispute.

8. Certification of representatives. Proper certification of the name or names of the organizations or individuals that have been designated and authorized to represent the employees involved in this dispute will be made by The National Mediation Board to the parties to the dispute, and the same will also be certified to the Carrier.

9. Final disposition of ballots. The original ballots and tabulating sheets together with the report of the results of the election by the Mediator will be filed with the Naional Mediation Board, at Washington, D. C., for reference and safekeeping.

By Order of the National Mediation Board.

Tedford E. Schoonover,
Mediator.

51 Filed Mar 22 1948

Exhibit No. 9

NATIONAL MEDIATION BOARD
WASHINGTON

Case No. R-1735.

CERTIFICATION.

In the matter of
REPRESENTATION OF EMPLOYEES
of the
PENNSYLVANIA CENTRAL AIRLINES CORPORATION
Clerical, Office, Stores, Fleet and Passenger Service Employees.

May 13, 1947

The services of the National Mediation Board were invoked by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, to investigate and determine who may represent clerical, office, station and storehouse employees of the Pennsylvania Central Airlines Corporation, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof. An application was also received from the International Association of Machinists for investigation of a representation dispute involving stores, stockroom and commissary clerks, cargo handlers and agents and others who receive, ship, sort, handle, distribute and do record work in connection therewith of all plane parts, tools and stock, materials or supplies, including loading, unloading, packing and handling of all cargo, mail and express.

At the time these applications were received, janitors, as covered by the application received from the Brotherhood, were covered by an agreement between the United Transport Service Employees of America, CIO, and the carrier. In addition, stores personnel were covered by an agreement between the Air Line Mechanics Department, UAW-CIO and the carrier.

The Board assigned Mr. Clarence G. Eddy, Mediator, to investigate. During the course of the investigation the mediator was unable to secure an agreement between representatives of the contesting organizations on a list of eligible voters. Accordingly, the question of who should participate in the election was scheduled for a hearing before the Board. Following the hearing which was held during November 1946, a Determination of Craft or Class was issued under date of January 31, 1947, wherein the Board found that "a dispute exists among the craft or class of clerical, office, stores, fleet and passenger service employees of this carrier and directs that a mediator be assigned to conduct a ballot box election using an eligible list prepared by him from the carrier's records." Accordingly, Mr. T. E. Schoonover, Mediator, was assigned to conduct the balloting in this case.

52 As a result of requests for reconsideration from interested parties, the Board held a second public hearing, and on April 25, 1947, affirmed its Determination of January 31, 1947 with a provision excepting station managers (as they are generally designated on different airlines) because their duties and responsibilities "are of such a character that these positions do not constitute a part of the craft or class of clerical, office, stores, fleet and passenger service employees."

Following is the result of the election as reported by the mediator and attested to on May 7, 1947, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees	International Association of Machinists (Airline Division)	Airline Mechanics Dept. UAW-CIO	United Transport Service Employees CIO	Other Organizations or Individuals	Void ballots	Number of Employees Eligible to Vote
Clerical, office, stores, fleet and passenger service employees	764	117	1	8	13	214	1,749

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, has been duly designated and authorized to represent clerical, office, stores, fleet and passenger service employees of the Pennsylvania Central Airlines Corporation, for the purposes of the Railway Labor Act.

By Order of the National Mediation Board.

Robert F. Cole,
Secretary.

53 Filed Mar 22 1948

Exhibit No. 10

NATIONAL MEDIATION BOARD
WASHINGTON 25

May 15, 1947
Case No. R-1735

Mr. Robert J. Wilson, *V. P.*
Pennsylvania Central Airlines Corp.
National Airport
Washington, D. C.

Mr. H. W. Brown, *President*
International Association of Machinists
Machinists Bldg.
Washington, D. C.

Mr. Geo. M. Harrison, *President*
Brotherhood of Railway & Steamship Clerks
Cincinnati 2, Ohio

Mr. Willard S. Townsend, *Int'l. Pres.*
United Transport Service Employees of America
3452 So. State St.
Chicago 16, Ill.

MR. R. J. THOMAS, *President*
Air Line Mechanics, UAW-CIO
411 West Milwaukee Ave.
Detroit, Michigan

Gentlemen:

By direction of the Board I am enclosing Certification in the matter of representation of Clerical, Office, Stores, Fleet and Passenger Service Employees of the Pennsylvania Central Airlines Corporation.

Very truly yours,

ROBERT F. COLE,
Secretary.

Enclosure

* * * * * * * * * *

[Attached Certification omitted since it is a duplicate of Exhibit No. 9.]

56 Filed Mar 22 1948

Exhibit No. 11

NATIONAL MEDIATION BOARD
WASHINGTON

CERTIFICATION.

In the matter of

REPRESENTATION OF EMPLOYEES

of the

PENNSYLVANIA CENTRAL AIRLINES CORPORATION

Airline Mechanics Group.

February 26, 1946

Case No. R-1565.

The services of the National Mediation Board were invoked by the International Association of Machinists, A.

F. of L., to investigate and determine who may represent maintenance of equipment employees as follows: inspectors, all grades including lead; airplane, plant, machine and building mechanics, all grades including lead, helpers and apprentices; (excluding hangar cleaners and janitors,) employed by the Pennsylvania-Central Airlines Corporation, for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employees were represented by the Air Line Mechanics Department, UAW-CIO.

The Board assigned Mr. Frank C. Bandel, Mediator, to investigate. During the course of the investigation the interested parties agreed upon an eligible list consisting of lead, senior and junior mechanics, lead and plant maintenance mechanics, plant servicemen, ground servicemen, inspectors, cleaners, parts cleaners, sandblasters, ship cleaners, and ship polishers and apprentices, hereinafter referred to as "airline mechanics group."

After finding that a dispute existed among the employees concerned, the Board directed the mediator to take a secret ballot to determine their choice using the eligible list agreed to by the contestants.

Following is the result of the election as reported by the mediator and attested to on February 21, 1946, by representatives of the contesting organizations who acted as observers:

Number of employees voting:

	For International Assn. of Machinists, A. F. of L.	For Air Line Mechanics Department, UAW-CIO.	For other organizations or individuals	Void ballots	Number of employees eligible to vote
Airline mechanics group	408	204	1	6	765

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the International Association of Machinists, A. F. of L., has been duly designated and authorized to represent the airline mechanics group employed by the Pennsylvania-Central Airlines Corporation, for the purposes of the Railway Labor Act.

By Order of the National Mediation Board.

Robert F. Cole,
Secretary.

* * * * * * * * * *

58 Filed Mar 22 1948

Supplemental Memorandum in Support of Defendant's Motion to Dismiss

The attached affidavit, dated March 8, 1948, is submitted as Exhibit A to be attached to and in support of the defendant's motion to dismiss in the above action.

Respectfully submitted,

Edward J. Hickey, Jr.,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

Attorney for Defendant,
National Mediation Board.

John F. Sonnett,
Assistant Attorney General.

George Morris Fay,
United States Attorney.

Dated: March 22, 1948.

[Exhibit A attached hereto is an Affidavit of Robert F. Cole, printed above as an attachment to Motion for Summary Judgment, and is therefore omitted here.]

* * * * * * * * * *

65 Filed Mar 23 1948

Motion of Defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, for Summary Judgment

Now comes the defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, through its attorneys, and moves the Court for a summary judgment for this defendant, on the ground that there is no genuine issue as to any material fact in this case, and that said defendant is entitled to such judgment as a matter of law.

In support of this motion, the attention of the Court is respectfully directed to (1) the affidavit of Robert F. Cole, Secretary of the National Mediation Board, which is attached to and made a part of the motion for summary judgment filed by the defendant National Mediation Board; (2) the affidavit of George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which is attached hereto, and made a part hereof; (3) the motion to dismiss and supporting statement of points and authorities filed herein by this defendant and the defendant International Association of Machinists; (4) the memorandum of the union defendants in support of their motion to dismiss the complaint, and (5) the memorandum brief of the

66 defendant National Mediation Board, in support of its motion for summary judgment and its motion to dismiss the complaint.

BINGHAM, COLLINS, PORTER & KISTLER.

By LINTON M. COLLINS,
921 Tower Building,
Washington 5, D. C.

MULHOLLAND, ROBIE & MCEWEN,
Of Counsel.

By CLARENCE M. MULHOLLAND
741 Nicholas Building,
Toledo 4, Ohio.

Attorneys for Defendant,
Brotherhood of Railway and
Steamship Clerks, Freight
Handlers, Express and
Station Employees.

* * * * * * * * * *

67 Filed Mar 23 1948

Exhibit B

GRAND LODGE

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
BROTHERHOOD OF RAILWAY CLERKS BUILDING
CINCINNATI, 2, OHIO

Geo. M. Harrison
Grand President

State of Ohio, County of Hamilton, ss:

I, George M. Harrison, being first duly sworn, deposes, and says: I am Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, with office at the Grand Lodge headquarters, 1015 Vine Street, Cincinnati, Ohio.

On Wednesday, May 14, 1947 the delegates to the 18th Grand Lodge Convention of the Brotherhood assembled in Cincinnati, Ohio and adopted Resolution 141, removing "color" restrictions on membership in the Brotherhood by deleting from its Constitution the requirement that an applicant for membership be a white person, and disposed of its auxiliary lodges in the following manner:

"Resolved, that if and when the word 'white' is duly and legally stricken from the Constitution of the Grand Lodge, Statutes for the Government of Lodges and Protective Laws of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, the

Grand President shall within six months from the effective date of such change in the Constitution, and after consultation with and advice of the General Chairmen of the respective System Boards, cause to be issued such Brotherhood charters as will best serve the inetrests of the Borterhood in lieu of Auxiliary charters now in existence. The continuity of membership of those involved shall not be affected."

As a result, effective July 1, 1947 any person, regardless of race, creed, color, or national origin employed in the services under our jurisdiction, may apply for membership in any of our local lodges. Each local lodge reserves the right to deny admission to its membership to any applicant but they must not discriminate account of race, creed, color or national origin of the applicant. Members of re-chartered local lodges will enjoy the same right and privilege of transferring membership to any other local lodge chartered by the Brotherhood as any other member of the Brotherhood. There are no rules imposed on re-chartered local lodges that do not apply to all other local Brotherhood lodges. All auxiliary lodge charters were recalled and Brotherhood charters issued to said lodges on or before December 31, 1947 pursuant to the requirements of the Resolution.

68 There are approximately 23,000 Negro members of the Brotherhood. They will enjoy not only equal benefits under collective bargaining agreements but through regular local lodges they have the right of equal participation in all affairs of the Brotherhoods.

GEO. M. HARRISON.

Subscribed and sworn to before me this 13 day of March, 1948.

BEA DAVIS,
Notary Public,

in and for the County of Hamilton, State of Ohio.

My Commission expires Sept. 27, 1950.

* * * * * * * * * * *

69 Filed Mar 23 1948

Motion of Defendant International Association of Machinists for Summary Judgment

Now comes the defendant International Association of Machinists, through its attorneys, and moves the Court for a summary judgment for this defendant, on the ground that there is no genuine issue as to any material fact in this case, and that said defendant is entitled to such judgment as a matter of law.

In support of this motion, the attention of the Court is respectfully directed to (1) the affidavit of Robert F. Cole, Secretary of the National Mediation Board, which is attached to and made a part of the motion for summary judgment filed by the defendant National Mediation Board; (2) the affidavit of William E. Willis, Assistant General Secretary-Terasurer of the International Association of Machinists, which is attached hereto, and made a part hereof; (3) the motion to dismiss and supporting statement of points and authorities filed herein by this defendant and the defendant Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; (4) the memorandum of the union defendants in support of their motion to dismiss the complaint, and (5) the memorandum brief of the defendant National Mediation

70 Board, in support of its motion for summary judgment and its motion to dismiss the complaint.

BINGHAM, COLLINS, PORTER & KISTLER.
By LINTON M. COLLINS,
921 Tower Building,
Washington 5, D. C.
MULHOLLAND, ROBIE & MCEWEN,
Of Counsel.
By CLARENCE M. MULHOLLAND,
741 Nichols Building,
Toledo 4, Ohio.
Attorneys for Defendants,
International Association
of Machinists.

* * * * * * * * * *

Affidavit.

71 Filed Mar 23 1948

City of Washington, District of Columbia, ss:

I, William E. Willis, being first duly sworn, depose and say, I am Assistant General Secretary-Treasurer of The Grand Lodge of the International Association of Machinists, and I am familiar with the provisions of the Constitution of the said Organization and other regulations relating to the eligibility of persons for membership in said Association.

Second: It is within my personal knowledge that neither the Constitution, Ritual nor other laws of the said Organization bar persons from membership solely upon the basis of their race, color or creed.

Third: It is within my personal knowledge that certain of the local lodges of the International Association of Machinists have and do admit negroes to membership.

WILLIAM E. WILLIS.

Subscribed and sworn to before me this 19th day of March, 1948.

B. W. GRANT,
Notary Public.

My Commission expires May 14, 1949.

* * * * * * * * * *

72 Filed Mar 23 1948

Supplemental Memorandum in Support of Motion to Dismiss Filed by Defendants International Association of Machinists and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

The attached copies of affidavits, marked Exhibits A and B, the originals of which are attached to the Motions of the above defendants for summary judgment, filed herein,

are also submitted in support of the above defendants' motion to dismiss heretofore filed in this action, and it is respectfully requested that they be attached to and made a part of said motion to dismiss.

Respectfully submitted,

BINGHAM, COLLINS, PORTER & KISTLER.

By LINTON M. COLLINS,
921 Tower Building,
Washington 5, D. C.,

Attorneys for Defendants,
International Association of
Machinists, and Brotherhood of
Railway and Steamship Clerks,
Freight Handlers, Express and
Station Employees.

Of Counsel:
MULHOLLAND, ROBIE & MCEWEN,
741 Nicholas Building,
Toledo 4, Ohio.

* * * * * * * * * *

74 Filed Jun 3 1948

Affidavit in Opposition to Motion to Dismiss and Motions for Summary Judgment

District of Columbia, ss:

James A. Cobb, being first duly sworn according to law on oath deposes and says: That he is the attorney for the United Transport Service Employees of America, CIO, plaintiffs in the above entitled cause, and sets forth the matters and things hereinafter outlined by reason of his professional contact in the matters herein referred to.

Affiant sets forth that heretofore, and as of, to wit, July 17, 1945 an agreement was entered into between the Pennsylvania-Central Airlines Corporation and certain of its

employees classified as janitors, as represented by the United Transport Service Employees of America, CIO, hereinafter referred to as UTSEA-CIO, which agreement was recognized by the National Mediation Board, the terms of which are set forth in an agreement attached hereto and prayed to be considered as a part hereof. Affiant directs the attention of the Court particularly to the part of said agreement appearing on page 8 thereof and reading as follows:

"This agreement shall become effective (except as provided in Rule 17) as of the date of the signing hereof and shall continue in full force and effect until October 1, 1946, and shall renew itself without change thereafter from year to year, unless written notice of intended change is served in accordance with Section 6, Title 1, of the Railway Labor Act, as amended, by either party hereto at least thirty (30) days prior to October 1st in any year."

Affiant sets forth that thereafter and as of, to wit, January 31, 1947, the National Mediation Board, without notice to the UTSEA-CIO and without complaint on the part of the employees involved, saw fit and did issue a determination of craft or class in which it removed these employees from the representation by the UTSEA-CIO and
75 arbitrarily designated them as being represented by two organizations, the International Association of Machinists and the Brotherhood of Railway Steamship Clerks, et al, in neither of which organizations were the said employees entitled to fullfledged membership.

In this connection attention is called to the Affidavit of George M. Harrison, filed in this cause and sworn to as of March 13, 1948, to the effect that on Wednesday, May 14, 1947, a date subsequent to the determination by the National Mediation Board hereinbefore referred to, the Brotherhood of Railway Steamship Clerks, et al undertook to remove the color restrictions on membership in the Brotherhood, which said resolution was to become effective

as of July 1, 1947. Six months after the effective date in the change of the constitution, the Grand President was given the right to issue such Brotherhood charters, "as will best serve the Brotherhood in lieu of auxiliary charters now in existence". It is further to be noted in this regard that this language appears—"each local lodge reserves the right to deny admission to its membership to any applicant, but it must not discriminate on account of race, creed, color or national origin of the applicant".

Affiant sets forth upon his information and belief that since the time of the enacting of said rule no colored person has been admitted into the Brotherhood in the District of Columbia, the suggestion being made that the rule has been adopted to meet the State laws in certain jurisdictions which prevent the operations of these organizations on a discriminatory basis. Affiant sets forth that representations in the pleadings made to the contrary, notwithstanding admitted this error and injustice was never corrected. Affiant avers on the contrary that the only step subsequently taken by the National Mediation Board was the allowance to counsel representing the UTSEA-CIO to protest this action formerly taken as of January 31, 1947. Affiant specifically denies that there was ever any re-election held or hearing on the merits as far as the election was concerned with notice, and as supportive of this statement invokes excerpts from the interchange of correspondence had in this regard which is chronologically here set forth, attached hereto and prayed to be considered as a part hereof.

76 First of all and prior to the time of the determination made by the National Mediation Board, it is significant particularly in the light of the Affidavit of Robert F. Cole, Secretary, filed in support of the motions for summary judgment and motion to dismiss, paragraph 8 thereof, from which we quote:

"In applying the Board's determination for purposes of conducting a representation election among the 1749 em-

ployees in this craft or class on Pennsylvania-Central Airlines, it was discovered for the first time during February 1947 that some eight of this total number of employees who were janitors and cleaners in and around the offices and office buildings were represented by a labor organization known as the United Transport Service Employees of America, CIO, and were covered by a labor agreement effective July 17, 1945 between that organization and Pennsylvania-Central Airlines. It was due to the fact that the number of such employees is so small in relation to the total number in the craft or class that the representation by United was previously overlooked."

In this connection we quote from a communication from the same Robert F. Cole, addressed to this Affiant, dated November 1, 1946 in answer to a communication from your Affiant dated October 2, 1946 making inquiry as to the status of cleaners employed by Pennsylvania-Central Airlines, referring to Case No. R-1565, in which we find the following language:

"In addition, if the cleaners to which you refer are classified by the carrier as janitors, such employees are now covered by a labor agreement effective July 17, 1945 between the carrier and the United Transport Service Employees of America."

In spite of the foregoing, as indicated, the determination of the National Mediation Board changing the representation of these employees was had as of January 31, 1947 without notice to the UTSEA-CIO as is manifest by reference had to the letter from Robert F. Cole, dated April 7, 1947, Case No. R-1735, addressed to Robert J. Wilson, Vice President, Pennsylvania-Central Airlines; Willard S. Townsend, Int's President, UTSEA-CIO, George M. Harrison, Grand President, Brotherhood Railway Steamship Clerks, and H. W. Brown, President, Int'l Association of Machinists. It is to be noted in this communication that the hearing referred to be held on April 17, 1947, later con-

tinued to April 21, 1947, was for the purpose of considering the question of the inclusion of these janitors and cleaners in the craft or class previously determined by the
77 National Mediation Board. Pursuant to that notice Affiant appeared April 21, 1947 for the purpose of again protesting against the inclusion of these employees in the craft or class as determined by the National Mediation Board in its determination of January 31, 1947. Affiant sets forth that this was the only hearing accorded the UTSEA-CIO and specifically denies that there was any participation of the UTSEA-CIO in any election had with proper notice or even the discussion of same, but avers on the contrary that, as indicated, he appeared as counsel simply to protest the inclusion of these employees.

Affiant further sets forth that he appeared at 10 A.M. and made verbal protest, and was given an opportunity to reappear at 2 P.M. and translate his oral protest into writing, which was done as is manifest by reference had to the document filed by counsel on behalf of the National Mediation Board and made a part of the record in this cause.

Additional reference to communications had from Secretary Robert F. Cole will evidence that nothing beyond an opportunity to present evidence and argument in support of the protest was ever accorded the UTSEA-CIO, and that the election had without notice was simply persisted in and bolstered by reaffirmance rather than to give to the UTSEA-CIO any actual opportunity to participate in any election upon due notice had. We quote first from the notice of hearing first issued by Mr. Cole:

"A formal hearing will be held before the National Mediation Board on this petition to reconsider the Finding made in the Determination January 31, 1947; the date for this hearing cannot be fixed at this time due to vacancies existing in the membership of the Board. However, all parties concerned will be notified of the date of hearing as soon as the two existing vacancies on the Board have been filled."

We quote again from Secretary Cole's communication addressed to this Affiant, dated February 17, 1947:

"As a result of that protest the Board, on February 11, 1947 issued a notice of hearing. Although our records show a copy of the notice of hearing has already been sent to you, an additional copy is attached hereto for ready reference. You will note that the exact date of the hearing in this matter is yet to be determined. When this hearing is held you will be given an opportunity to present evidence and argument in support of your protest."

78 The protest referred to was against the determination already had as of January 31, 1947. Entirely conclusive of the argument, we submit, is the letter from Secretary Cole dated June 17, 1947, which reads as follows:

"Further reference is made to your petition for rehearing of the determination made by the Mediation Board in its Findings dated January 31, 1947 in the matter of representation of employees of the National Airlines, Inc., et al, Cases Nos. R-1706, 1718, 1720, 1721, 1729, 1735 and 1744. The Board has given due consideration to your request for further hearing in this dispute and finds that your petition does not introduce any new facts not considered by the Board at the time it reconsidered the Findings of January 31, 1947 at the further hearing held by the National Mediation Board on April 21st. Under these circumstances, it would not be consistent for the Board to hold a third hearing in the matter which has already been finally adjudicated."

Couple this with the excerpt from the letter of September 5, 1947, addressed to Mr. Robert F. Cole, Secretary of the National Mediation Board, from J. W. Burke, Jr., Personnel Director, P-CA, and the fact that the only effective steps taken were the determination of January 31, 1947 and the reaffirmance of that same determination as of April 21, 1947, and the answer is unquestioned that the only op-

portunity had to the UTSEA-CIO was the protest on the determination had as of January 31, 1947 without notice to it or to the employees involved.

The record discloses to a demonstration that the colored employees here involved were not, at the time of the determination had, members and could not become full-fledged members of the Brotherhood solely on account of race and color. To have been assigned without notice to such an organization by the Mediation Board was a violation of the rights of these employees and of the UTSEA-CIO, their lawful representative. This position is admitted and emphasized by the Government in its Brief filed in the Tunstal and Steele cases from which we quote:

"Tom Tunstall, Petitioner v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, et al; and Bester William Steele, Petitioner v. Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, An Unincorporated Association, et al, Nos. 37 and 45, in The Supreme Court of the United States, October Term
79 1944.

"The discrimination in these cases is aggravated by the fact that the colored employees have no opportunity to participate in the formulation of the policies which the Brotherhood maintains as the representative of the entire craft. For they may not become members of the Brotherhood and may not take part in its deliberations. Thus they do not share in the protection against arbitrary or discriminatory action which is available to members of the organization. The officials of labor organizations which have achieved representative status under the National Labor Relations Act or the Railway Labor Act are to a large extent guided by the views of the members of the organization for which they speak. The latter have ultimate power to approve or disapprove. An individual employee who is a member of the representative union can go to meetings,

participate in discussions, and obtain a hearing for his viewpoint. Even if his arguments do not prevail, the existence of such a forum in which the negotiators for the craft can be called to account has a tendency to avert arbitrary, unreasonable, or discriminatory action, and normally insures that such action will not be taken. Similarly, an employee who is not, but could if he chose be, a member of the union cannot complain of his own failure to take part in the deliberations which are to affect his working conditions. Moreover, he is a member of the group to which the union looks for support to maintain its status as statutory representative. Where, however, a union excludes a minority of the craft from membership, these ordinary controls upon the process of collective bargaining cannot benefit the excluded groups. In such a case the majority representative may feel free to ignore the interests of the minority, as is here alleged. Certainly where an organization enters into agreements for the purpose of discriminating against employees in the bargaining unit who are not permitted to become members, it cannot be said to be acting in good faith as the representative of the entire craft.[26]

"26 the only prior decision on this point under the Railway Labor Act held that Congress never intended such 'an intolerable situation' as to 'force upon any class of employees representation through an agency with whom it has no affiliation nor right of association.' " Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees, 137 F. (2d) 817, 821-822 (App. D. C.).

Manifestly this view was adopted by the Supreme Court of the United States in the Tunstall and Steele cases as the Supreme Court there reversed the decision of the Supreme Court of Alabama and the U. S. Court of Appeals, 4th Circuit, adopting as their decision the line of argument made by the Government in the Brief Amicus Curiae filed in those cases, signed by Charles Fahy, Solicitor General; Robert L. Stern, Special Assistant to the Attorney General, and

by General Counsel and attorneys representing the National Labor Relations Board.

JAMES A. COBB,
Affiant.

Subscribed and sworn to before me this 3rd day of June, 1948.

MARY B. CRAWFORD,
Notary Public, D. C.

* * * * * * * * * *

81 Filed Jun 7 1948

Response of Defendant National Mediation Board to Plaintiffs' Affidavit in Opposition to Motion to Dismiss and Motions for Summary Judgment

Now comes the defendant National Mediation Board through its attorneys, and in response to plaintiffs' affidavit in opposition to motion to dismiss and motions for summary judgment, respectfully shows to the Court:

1. Said affidavit is not in accordance with or responsive to the leave heretofore granted to plaintiff by this Court.

2. Said affidavit sets forth plaintiffs' arguments and conclusions, and is made by counsel, and purports to be based in large part upon information and belief, and is not a statement of fact by a competent witness or witnesses having personal knowledge thereof.

Wherefore, defendant prays that said affidavit be stricken or disregarded by the Court.

EDWARD DUMBAULD,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.
Attorney for Defendant,
National Mediation Board.

JOHN F. BAECHER,
Acting Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
Dated: June 7, 1948.

* * * * * * * * * *

83 Filed Jun 10 1948

Response of Defendants International Association of Machinists and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

Now come the defendants, International Association of Machinists and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and in response to Plaintiff's affidavit in opposition to motion to dismiss and motion for summary judgment respectfully show to the court:

1. That the affidavit filed by counsel for the Plaintiff is not in accordance with, or responsive to, the leave heretofore granted to the Plaintiff by the court.

2. The affidavit sets forth arguments and conclusions of Plaintiff's counsel and purports to be based in large part upon counsel's information and belief and is not a statement of fact by a competent witness or witnesses, having personal knowledge thereof.

3. That there is attached to this response on the part of said defendants, an affidavit of George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, setting forth that there are now 395 colored persons as members of the Brotherhood in the District of Columbia, which said affidavit refers to certain allegations in the affidavit of counsel for the Plaintiff and to which the

84 court's attention is respectively directed.

Wherefore, these defendants pray that said affidavit be stricken or disregarded by the court.

BINGHAM, COLLINS, PORTER & KISTLER.

By LINTON M. COLLINS,

Attorneys for Defendants,
International Association of
Machinists, and Brotherhood
of Railway and Steamship Clerks,
Freight Handlers, Express and
Station Employes.

MULHOLLAND, ROBIE & MCEWEN.
741 Nicholas Building,
Toledo 4, Ohio.

By CLARENCE M. MULHOLLAND,
Of Counsel.

* * * * * * * * * * *

85 Filed Jun 10 1948

Exhibit (1)

State of Ohio, County of Hamilton, ss:

I, George M. Harrison, being first duly sworn, deposes, and says: I am Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes with office at the Grand Lodge Headquarters, 1015 Vine Street, Cincinnati, Ohio.

My attention has been called to the contents of an affidavit of James A. Cobb, in opposition to motions to dismiss and motions for summary judgment in the case of United Transport Service Employees of America, CIO, et al, v. National Mediation Board, et al, Civil Action No. 4807—'47; that the affiant, James A. Cobb, has made the statement that "affiant sets forth upon his information and belief, that since the enacting of said rule, no colored person has been admitted into the Brotherhood in the District of Columbia."

83 Filed Jun 10 1948

Response of Defendants International Association of Machinists and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

Now come the defendants, International Association of Machinists and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and in response to Plaintiff's affidavit in opposition to motion to dismiss and motion for summary judgment respectfully show to the court:

1. That the affidavit filed by counsel for the Plaintiff is not in accordance with, or responsive to, the leave heretofore granted to the Plaintiff by the court.

2. The affidavit sets forth arguments and conclusions of Plaintiff's counsel and purports to be based in large part upon counsel's information and belief and is not a statement of fact by a competent witness or witnesses, having personal knowledge thereof.

3. That there is attached to this response on the part of said defendants, an affidavit of George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, setting forth that there are now 395 colored persons as members of the Brotherhood in the District of Columbia, which said affidavit refers to certain allegations in the affidavit of counsel for the Plaintiff and to which the

84 court's attention is respectively directed.

Wherefore, these defendants pray that said affidavit be stricken or disregarded by the court.

BINGHAM, COLLINS, PORTER & KISTLER.

By LINTON M. COLLINS,

Attorneys for Defendants,
International Association of
Machinists, and Brotherhood
of Railway and Steamship Clerks,
Freight Handlers, Express and
Station Employes.

MULHOLLAND, ROBIE & McEWEN.
741 Nicholas Building,
Toledo 4, Ohio.

By CLARENCE M. MULHOLLAND,
Of Counsel.

* * * * * * * * * * *

85 Filed Jun 10 1948

Exhibit (1)

State of Ohio, County of Hamilton, ss:

I, George M. Harrison, being first duly sworn, deposes, and says: I am Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes with office at the Grand Lodge Headquarters, 1015 Vine Street, Cincinnati, Ohio.

My attention has been called to the contents of an affidavit of James A. Cobb, in opposition to motions to dismiss and motions for summary judgment in the case of United Transport Service Employees of America, CIO, et al, v. National Mediation Board, et al, Civil Action No. 4807—'47; that the affiant, James A. Cobb, has made the statement that "affiant sets forth upon his information and belief, that since the enacting of said rule, no colored person has been admitted into the Brotherhood in the District of Columbia."

The records of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees show that at least 395 colored persons are now members of the Brotherhood in the District of Columbia and entitled to full right of membership and enjoy not only equal benefits under collective bargaining agreements but through regular local lodges they have the right of equal participation in all affairs of the Brotherhood, as set forth in my affidavit heretofore given and filed in this same case.

GEO. M. HARRISON.

Subscribed and sworn to before me this 8th day of June, 1948.

MAURICE GOLDMAN,
Notary Public,

in and for the County of Hamilton, State of Ohio.

My Commission expires March 29, 1949.

* * * * * * * * * *

86 Filed Jul 21 1948

Judgment, Order and Decree

This cause having come on for hearing upon the motions to dismiss and motions for summary judgment filed by the defendants, National Mediation Board, International Association of Machinists, and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Court, upon consideration of the pleadings and supporting memoranda filed herein and the arguments of counsel, having concluded, found and determined that the motions for summary judgment should be granted, it is hereby

Ordered, Adjudged and Decreed that the motions for summary judgment be, and they are hereby granted, and the complaint is hereby dismissed with prejudice, at plaintiff's costs.

This 19th day of July, 1948.

F. DICKINSON LETTS,
Justice.

No objection as to form:

COBB, HOWARD & HAYES.

By JAMES A. COBB,
Attorneys for Plaintiffs,
613 F Street, N. W.,
Washington, D. C.

87 Assistant Attorney General of the United States.

By HUBERT A. BERGSON,
Attorney for National Mediation Board, a defendant.

BINGHAM, COLLINS, PORTER & KISTLER.

By LINTON M. COLLINS,
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1016 Ring Building
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No. 10010

BRIEF FOR BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, ET AL.,
Appellants,

v.

NATIONAL MEDIATION BOARD, ET AL.,
Appellees.

Appeal From a Judgment of the United States District Court for the District of Columbia

---

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United States Court of Appeals
for the District of Columbia
Circuit
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10010

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, ET AL.,
Appellants,

v.

NATIONAL MEDIATION BOARD, ET AL.,
Appellees.

Appeal From a Judgment of the United States District Court for the District of Columbia

---

BRIEF FOR BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, APPELLEES

COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS BELOW

Certain errors and omission in appellants' Statement of the Case [1] require this counterstatement.

Appellants assert in their brief (pp. 2, 3) that the complaint filed in the District Court was supported by an affidavit. On the contrary, no affidavit was filed with the

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[1] Appellants' brief, pp. 2-5.

complaint, as the record of the proceedings below clearly shows (App. 2-6).[2] It was primarily for this reason that appellees moved for summary judgment and attached affidavits which contradicted the factual allegations of the complaint, since it is well established that where affidavits controvert unverified averments in a complaint there is no genuine issue of material fact and summary judgment is proper. *Battista* v. *Horten, Myers & Raymond*, 76 App. D. C. 1, 2-3, 128 F. 2d 29, 30-31; *Geller* v. *Trans-America Corp.*, 53 F. Supp. 625, 629 (D. Del.). The only affidavit of any kind proferred by appellants was one executed by their counsel in opposition to appellees' motions to dismiss and for summary judgment, and filed on June 3, 1948, after briefs had been filed and oral argument heard by the District Court (App. 67). This affidavit was duly objected to by appellees as not constituting a statement of fact by a competent witness (App. 75-77).

In their brief to this Court (pp. 6, 11-15) appellants apparently seek to advance a line of argument not urged below. They now allege as unlawful the certification issued by the National Mediation Board[3] as well as its craft or class determination. The latter was the only administrative action sought to be adjudged unlawful by the complaint.

In the court, below, appellees filed motions to dismiss on the following grounds: first, the complaint as drawn fails to state a claim upon which relief can be granted because

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[2] All "App." citations are to the Joint Appendix annexed to appellants' brief.

[3] For convenience, the following short descriptive titles of the parties involved in this case will sometimes be used: National Mediation Board will be referred to as the Board; appellant United Transport Service Employees of America, CIO, will be called UTSEA or appellant union; the individual plaintiffs bringing the action will be referred to as individual appellants; Pennsylvania Central Airlines Corporation will be called the carrier or appellee carrier; the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees and the International Association of Machinists will be referred to as the Brotherhood of Clerks and IAM, respectively, or collectively as appellee unions.

as a matter of law a craft or class determination by the Board cannot result in the grievances alleged by appellants in their complaint; second, the court lacks jurisdiction over the subject matter of the complaint because the administrative action here involved is not subject to judicial review (App. 10-11).[4]

As an alternative ground of defense, appellees filed motions for summary judgment, assuming, *arguendo*, judicial review to be available and the complaint to state a cause of action (App. 12, 62, 65). Affidavits attached to the motions contradicted the unverified allegations of the complaint (App. 13-60, 63-64, 66).

The District Court chose to grant the motions for summary judgment and did not pass upon the motions to dismiss (App. 78).[5]

In view of the fact that the affidavit filed by the Government in support of its motion for summary judgment contradicts in many particulars the unverified allegations of the complaint, which are repeated by appellants in their statement of the facts of the case to this Court, brief comment on the nature of the administrative action here sought to be declared unlawful and the circumstances of its exercise seems appropriate.

The Railway Labor Act[6] provides a procedure whereby railroad and air carrier employees have the right to organize and bargain collectively through representatives of their own choosing, leaving it to the majority of any craft or class to determine who shall be its representative for the purposes of the Act.[7] The Act further provides by

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[4] Appellee Pennsylvania Central Airlines filed an Answer to the complaint, setting up as a first ground of defense the failure of the complaint to state a claim upon which relief can be granted (App. 6).

[5] Appellants' brief (pp. 1, 5) erroneously states that the District Court granted the motions to dismiss.

[6] Hereafter sometimes referred to as the Act.

[7] 45 U. S. C. § 152, Fourth, the pertinent provision of which is set forth in the Supplement hereto, *infra*.

Section 2, Ninth,[3] a procedure for settling representation disputes among a carrier's employees. In directing the Board to investigate such disputes, this section of the Act authorizes the determination of the bargaining representative by secret ballot of the employees involved, and empowers the Board "to designate who may participate in the election". Where dispute exists as to the proper composition of a craft or class, as was true in this case, (App. 13-14, 23), the Board necessarily must first determine what particular duties and functions are so correlated as to constitute a craft or class before it can designate the employees who may participate in the selection of a representative for a particular group. Once the Board has made its determination of the craft or class and has conducted the election among the employees composing that unit, Section 2, Ninth of the Act directs the Board to certify the individual or organization chosen by the majority to represent the craft or class in collective bargaining with the carrier.

Such a procedure was followed in the case now before the Court, but it is solely the Board's craft or class determination which is assailed as unlawful. The complaint does not even allege the fact of certification in these proceedings, although, as the Board's affidavit discloses, the entire procedure provided by Section 2, Ninth of the Act was completed in this case, including the Board's certification as its final administrative act (App. 56-58).

The pervasive error of appellants' complaint and their brief in this Court, aside from the clear lack of jurisdiction, is their relation of half of what happened in the administrative proceedings here involved and their failure to acquaint the Court with the other half. Through this deficiency an appearance of arbitrary action and a denial of due process is created which actually was not the case, as

[3] 45 U. S. C. § 152, Ninth, the full text of which is also set forth in the Supplement.

the affidavit filed by the Secretary of the National Mediation Board clearly discloses. For example, appellants assert in their brief (p. 8) that the Board held its election in this case "without notice to UTSEA-CIO", and that it is no answer to say that UTSEA had a hearing after the election had been held and "the results known". Actually, the Board through oversight had neglected to notify appellant union of the hearing held on the craft or class determination (App. 14-15), but it took steps to correct this oversight by scheduling a second hearing to consider among other contentions in opposition to its craft or class determination such views as appellant union might wish to present (App. 15). Appellant union appeared at the second hearing and presented its opposition to the Board's inclusion of the janitors and cleaners within the clerical and office workers craft or class (App. 16, 49). In the meantime, the representation election was held after due notification to appellant union (App. 17) and opportunity for participation therein by all members of the craft or class, including the janitors and cleaners then represented by UTSEA. But the ballots cast were impounded pending the final decision of the Board after the second hearing as to what employees were properly classified as composing a craft or class and thus entitled to vote as a unit (App. 17). It was only after its second determination of the proper composition of the craft or class, in which appellant union's contentions were considered and rejected as without merit, that the Board ordered the ballots counted and thus determined that the Brotherhood of Clerks had won the election and was entitled to certification as the bargaining representative (App. 45, 49-50, 50, 57, 58).

Another example is appellants' repeated failure throughout this proceeding to recognize that the Board has made no determination or certification that could result in representation of any janitors and cleaners by IAM (App. 18).

Accordingly, at the outset it deserves to be emphasized, quite apart from jurisdictional arguments, that the Board's

handling of the proceeding on which review is sought was not arbitrary or unfairly prejudicial to appellants' rights, either statutory or Constitutional. Quite the converse is true, as the affidavit filed in support of the Government's motion for summary judgment proves beyond question (App. 13-61).

QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction to review the action of the Mediation Board here involved.

2. Whether the complaint states a claim upon which relief can be granted.

3. Assuming, *arguendo,* that judicial review is available and that the complaint states a cause of action, whether the District Court properly granted the motions for summary judgment because there is no genuine issue of material fact in dispute and appellees are entitled to judgment as a matter of law.

STATUTE INVOLVED

The statute involved is the Railway Labor Act as amended (45 U. S. C. § 151 *et seq.*), the pertinent provisions of which are set forth in the Supplement to this brief, *infra.*

SUMMARY OF ARGUMENT

I.

The subject matter of the complaint is not judicially reviewable. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *Brotherhood of Railway Clerks* v. *United Transport Service Employees,* 320 U. S. 715; *Kirkland et al.* v. *Atlantic Coast Line R. R. Co., Mediation*

Board, et al., 83 App. D. C. ...., 167 F. 2d 529, *cert. den.* 335 U. S. ...., 17 L. W. 3112; *United Transport Service Employees of America* v *Mediation Board*, 79 App. D. C. 15, 141 F. 2d 724; *Natl. Fed. of Ry. Workers* v. *Mediation Board*, 79 App. D. C. 16, 141 F. 2d 725. The cases relied upon by appellants in support of jurisdiction establish the contrary of the proposition for which they are cited. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210. Accordingly, the District Court lacked jurisdiction to entertain the action, the motions to dismiss filed below on that ground should have been granted, and the judgment below either should be modified so as to dismiss the action for want of jurisdiction, and affirmed as thus modified, *United Transport Serv. Emp.* v. *National Mediation Bd.*, 79 App. D. C. 15, 16, 141 F. 2d 724, 725; *Lever v. Parker*, 121 F. 2d 738, 739 (CCA 9th), or the case should be remanded to the District Court with directions to grant the motions to dismiss for lack of jurisdiction. *Jones* v. *Brush*, 143 F. 2d 733, 734-735 (CCA 9th).

II.

The complaint fails to state a claim upon which relief can be granted. The administrative action of the Mediation Board alleged by the complaint to be unlawful cannot, as a matter of law, result in the grievances asserted by the complaint. The administrative action involved is a craft or class determination by the Mediation Board, which is a preliminary finding in the process of certifying a collective bargaining representative pursuant to the provisions of Section 2, Ninth of the Railway Labor Act, 45 U. S. C. § 152, Ninth. Such step is merely a finding as to the identity of employees who may participate in the selection of a representative for a particular group. It does not confer any representation rights, nor does it impose any obligation upon a carrier to recognize any particular representative. It is only the Board's certification—its final administrative

action under Section 2, Ninth—which creates legal obligations to bargain collectively with respect to particular employees or the representatives of such employees. The complaint makes no allegation that any certification has been issued by the Board in this case or that appellee unions have been certified to represent the individual appellants. Accordingly, the complaint should be dismissed for failure to state a cause of action, assuming that the court otherwise has jurisdiction to entertain it.

III.

Assuming, *arguendo,* that judicial review is proper and that the complaint states a claim upon which relief can be granted, the summary judgment of the District Court should be affirmed because there is no genuine issue of material fact present in the case and appellees are entitled to judgment as a matter of law. The affidavits filed by the Mediation Board and by appellee unions clearly controvert the unverified allegations of the complaint. Under such circumstances it is well established that summary judgment is appropriate. *Battista* v. *Horten, Myers & Raymond,* 76 App. D. C. 1, 2-3, 128 F. 2d 29, 30-31; *Geller* v. *Trans-America Corp.,* 53 F. Supp. 625, 629 (D. Del.).

Appellants' claim that its Constitutional rights have been violated by the Board's craft or class determination is without merit or substance. *National Federation of Ry. Workers* v. *National Mediation Board,* 71 App. D. C. 266, 110 F. 2d 529, *cert. den.* 310 U. S. 628.

ARGUMENT

Because the issue of jurisdiction may be raised at any stage of the proceedings by either the parties to the action or by the Court *sua sponte, Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 588; *United States* v. *Griffin,* 303 U. S. 226, 228-229, appellee unions reassert in this Court lack of jurisdic-

tion in the District Court If the action of the Mediation Board here in issue is not subject to judicial review, this Court should either modify the judgment below so as to dismiss the action for want of jurisdiction, *United Transport Serv. Emp.* v. *National Mediation Bd.*, 79 App. D. C. 15, 16, 141 F. 2d 724, 725; *Lever* v. *Parker*, 121 F. 2d 738 (CAA 9th), or remand the case with directions to grant the motions to dismiss for lack of jurisdiction. *Jones* v. *Brush*, 143 F. 2d 733, 734-735 (CCA 9th).

Accordingly, as we view the case it requires inquiry initially into the court's jurisdiction, irrespective of the vulnerability of a complaint on other grounds. Therefore, our argument will proceed on the following grounds: (1) that the Court lacks jurisdiction to review the action of the Mediation Board here involved; (2) that the complaint fails to state a claim upon which relief can be granted; (3) assuming, *arguendo*, that the merits of the case are reached, summary judgment for the appellees is proper. Appellants' asserted grounds for reversal will be discussed in the course of this argument.

I.

The District Court Lacks Jurisdiction to Review the Action of the Mediation Board Here Involved

It is well settled that administrative proceedings of the National Mediation Board under Section 2, Ninth of the Railway Labor Act, including the specific action of the Board here challenged, are not subject to judicial review. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. It is unnecessary to enter upon a detailed discussion of the *Switchmen's* case because this Court has recently reviewed the decision and relied upon it in holding that the judicial review provisions contained in Section 10 of the Administrative Procedure Act [9] do not provide judicial

[9] 60 Stat. 243, 5 U. S. C. § 1009.

review for administrative proceedings of the Mediation Board under Section 2, Ninth of the Railway Labor Act. *Kirkland* v. *Atlantic Coast Line R. R. Co.*, 83 App. D. C. ...., 167 F. 2d 529 (decided April 19, 1948), *cert. den.* 335 U. S. ...., 17 L. W. 3112. In the *Kirkland* case this Court said:

> "The Supreme Court decided in 1943 that certifications of bargaining representatives under Sec. 2, Ninth of the Railway Labor Act are not subject to judicial review. The Court said in effect that the statute precludes review: 'the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 305 (1943)." [10]
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> ". . . The Railway Labor Act, as interpreted by the Supreme Court, upon its face gives clear and convincing evidence of intent to withhold judicial review. It is as true today as it was before the Administrative Procedure Act was passed that in such a case as this 'Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer.'" [11]

While it is unnecessary to quote at length from the Supreme Court's opinion in the *Switchmen's* case, one of the observations there contained warrants particular attention here because the specific phase of the Board's action challenged by the complaint is its craft or class determination, not its final action of certification. In the course of the opinion the Supreme Court said (320 U. S. 297 at 300-301):

> "The Act in § 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft

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[10] 83 App. D. C. ...., 167 F. 2d 529.

[11] 83 App. D. C. ...., 167 F. 2d 529, 530.

> or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. 2d 757;[12] *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F. 2d 780.[13] *A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'.*" (Italics supplied.)

Shortly after its decision in the *Switchmen's* case, the Supreme Court in *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715, not only reaffirmed its holding that the federal courts lacked jurisdiction to review in any respect the action of the Board in jurisdictional representation disputes, but did so in a case where this Court had held the action of the Board "to be clearly arbitrary."[14]

The jurisdictional holding of the *Switchmen's* case has been uniformly applied without exception by this Court in cases seeking judicial review of administrative action of the Board under Section 2, Ninth of the Railway Labor Act. *United Transport Service Employees of America* v. *Mediation Board*, 79 App. D. C. 15, 141 F. 2d 724; *Natl. Fed. of Ry. Workers* v. *Mediation Board*, 79 App. D. C. 16, 141 F. 2d 725; *Kirkland* v. *Atlantic Coast Line R. R. Co.*, 83 App. D. C. ...., 167 F. 2d 529, *cert. den.* 335 U. S. ...., 17 L. W. 3112.

That appellants partially recognize the bar created to the maintenance of this action by the *Switchmen's* case is

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[12] 66 App. D. C. 375.

[13] 77 App. D. C. 259.

[14] See *Order of Railway Conductors* v. *National Mediation Board*, 79 App. D. C. 1, 2, 141 F. 2d 366, 367, where this Court makes the quoted observation.

disclosed by their brief (p 7).[15] But appellants contend that two cases decided by the Supreme Court subsequent to its decisions in the *Switchmen's* case and *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees, supra,* either overruled these decisions "or differentiated the situation as applied to the facts in the instant case." (Appellants' brief, p. 18).

The two Supreme Court decisions relied upon are *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210. Since appellants' entire argument in support of jurisdiction is predicated on these two decisions, the holding of the Supreme Court there announced and the careful jurisdictional differentiation made by the Court from the situation here presented will be treated in some detail.

The briefest reading of the *Steele* and *Tunstall* opinions[16] shows that jurisdiction there assumed is completely inapplicable to administrative action taken by the Mediation Board under Section 2, Ninth of the Railway Labor Act. No decisions of which we are aware more clearly show that the subject matter of this complaint is not subject to judicial review.

The *Steele* and *Tunstall* cases deal exclusively with the questions of whether the Railway Labor Act imposes on *a labor organization,* acting by authority of the statute as the exclusive bargaining representative of a craft or class

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[15] However, the qualification suggested by appellants that findings of the Mediation Board are reviewable in cases showing "abuse of discretion on the part of the Board" is certainly disproven by the Supreme Court's action in *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees,* 320 U. S. 715.

[16] *Steele* and *Tunstall* were companion cases dealing with the same problem. They differed only in that the *Steele* case came up on appeal from a state court decision while the action in the *Tunstall* case was maintained in the federal district court. Since the observations of law contained in the *Steel* opinion are equally applicable in the *Tunstall* decision, separate quotation from the latter case will be omitted.

of employees, the duty to represent all of the employees in the craft or class without discrimination because of their race or color, and if so whether the courts have jurisdiction to protect the minority of the craft or class from a violation of such obligation.

The court answered both of these questions in the affirmative. We concede that such an obligation exists and that the courts may secure its enforcement, but in this case there is no allegation that a labor organization representing these appellants has refused or failed to represent the individual appellants without discrimination because of their race.

Here the issue is an entirely different one. Appellants challenge the right of the National Mediation Board to determine the craft or class to which the individual appellants belong—authority which Section 2, Ninth of the Railway Labor Act grants to the Board as a necessary incident to its duty to investigate disputes among labor organizations as to their collective bargaining representative, and to certify the representative chosen by the majority of the craft or class with which the employer must treat. As stated heretofore, the Supreme Court in the *Switchmen's* case clearly held that such administrative action by the Board is not subject to judicial review.

It is only when the representative so certified undertakes to improperly discriminate against members of the craft it represents that the rulings in the *Steele* and *Tunstall* cases come into play. Proof of this is demonstrated by reference to the grievances complained of in the *Steele* case and the manner in which the court treated the problem.

In that case, the Brotherhood of Locomotive Firemen & Enginemen was the exclusive bargaining representative of all firemen, both white and colored, employed by the Louisville & Nashville Railroad. The decision points out that the majority of the firemen were white and were mem-

bers of the Brotherhood, but that a substantial minority were negroes who by the constitution and ritual of the Brotherhood were excluded from membership.[17] The decision further points out that since the majority of the craft of firemen had the right to choose and had chosen the Brotherhood to represent the craft, the negro firemen were required to accept the Brotherhood as their representative for the purposes of the Act.[18]

The grievances alleged in the case for which redress was sought were as follows: An agreement negotiated by the Brotherhood with the Railroad, without notice to the negro firemen, provided that negro firemen could not be promoted to serve as engineers, could not exceed more than 50% of firemen employed in any seniority district, and contained other discriminatory restrictions, solely because of race, on opportunities of negroes to work and on their seniority rights. As a consequence of this agreement, certain negro firemen were deprived of employment and were assigned to more arduous and less remunerative work than that afforded to the white firemen of the same craft.

In asserting judicial power to remedy the situation here presented, the court held that under the Railway Labor Act a bargaining representative of a craft or class of railroad employees was under a statutory duty to fairly represent all employees in the craft or class—whether or not they are members of the representative organization—without discrimination because of race or color.[19]

But in sustaining the right of *Steele* to judicial relief against the union which had acted adversely on racial grounds to the persons it was obligated to represent fairly without discrimination, the court took the greatest pains to show that it still recognized the continued force of the

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[17] 323 U. S. 192, 194.

[18] Id. at 194-195.

[19] *Id.* at 199-204.

general rule announced in the *Switchemn's* case, and the distinction between that case—which sought review of administrative action of the Mediation Board—and the case under review which was maintained against the bargaining representative for violation of its statutory obligations. Two brief quotations from the court's opinion show unequivocally that this is so (323 U. S. 192, 204-205, 207):

> "The question here presented is not one of a jurisdictional dispute determinable under the administrative scheme set up by the Act, cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee* v *Southern Pacific Co.,* 320 U. S. 338; *Brotherhood of Clerks* v *United Transport Service Employees,* 320 U. S. 715, 816, or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee* v. *M.-K.-T. R. Co., supra,* 332, 337. There is no question here of who is entitled to represent the craft, *or who are members of it,* issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union* v. *National Mediation Board, supra; General Committee* v. *M.-K.-T. R. Co., supra.*" (Italics supplied.)
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> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. *Switchmen's Union* v. *National Mediation Board, supra,* 300; *Stark* v. *Wickard,* 321 U. S. 288, 306-7."

In short, the court in assuming jurisdiction to remedy a breach of a statutory obligation by a bargaining representative pointedly emphasizes its lack of jurisdiction to review the administrative proceedings of the Board which result in certification of bargaining representatives. The

Court also makes this quite clear in other portions of its opinion which have direct relevance to the grievances alleged in the case now before this Court and which completely refute appellants' interpretation of the decision. For example, the court states (323 U. S. 192, 206):

> "There is no administrative means by which Negro firemen can secure separate representation for the purpose of collective bargaining. For the Mediation Board has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives." [20]

So too in the instant case, the Board, upon consideration of appellants' contentions for separate representation at the hearing held on April 2, 1947, reiterated its holding that a craft or class may not be divided on the basis of race or color on the ground that "To hold otherwise would violate Section 2, Fourth of the Act which states that the majority of a craft or class shall have the right to determine representation for the entire craft or class for purposes of the law" (App. 49-50).[21]

Moreover, the court significantly observed in the *Steele* case with respect to an issue which represents the heart of appellants' case as alleged in the complaint [22] (323 U. S. 192 at 204):

> "While the statute does not deny to such a bargaining labor organization *the right to determine eligibility*

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[20] Citing in a note the cases in which the Board had held that a craft or class may not be split on the basis of race or color. See also a similar observation by the Court at p. 201.

[21] In support of this administrative determination of the Board on the merits prior to the Supreme Court's jurisdictional holding in the *Switchmen's* case, see *National Federation of Ry. Workers* v. *National Mediation Board*, 71 App. D. C. 266, 275, 110 F. 2d 529, 538, *cert. den.* 310 U. S. 628.

[22] Although appellants allege that appellee unions deny negroes membership, that allegation is expressly controverted by the affidavits filed in support of appellee unions' motions for summary judgment (App. 63, 66).

> *to its membership,* it does require the union, in collective bargaining and in making contracts with the carrier to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." (Italics supplied.)

Yet appellants, in an effort to support their argument that this case raises Constitutional questions which must be reviewed, infer that the late Chief Justice Stone, who delivered the opinion of the Court, stated that if negroes were barred from the union it would raise a Constitutional question over which the courts would have jurisdiction (Appellants' Brief, p. 10). What Chief Justice Stone did state was that if a union did bar negroes from membership, and that union was duly selected by a majority of craft or class to which the negroes belonged to act as the craft's bargaining representative, such union was under a statutory obligation to represent the negro non-union members of the craft fairly and impartially and without hostile discrimination.

It is clear that appellants have confused the statutory authority and duties of the Board under Section 2, Ninth of the Act, which are not reviewable in the courts, with the statutory responsibility and duties of a duly selected collective bargaining representative whose acts in its representative capacity are subject to judicial review.

No allegation is contained in the complaint concerning the conduct of appellee unions in their representative capacity, nor is any claim asserted that they have acted in a manner subject to judicial cognizance under the ruling of the *Steele* and *Tunstall* cases.

For the foregoing reasons, the action here maintained should be dismissed for lack of jurisdiction, and the judgment of the District Court either should be modified so as to dismiss the action for want of jurisdiction, or remanded with directions to grant the motions to dismiss for lack of jurisdiction.

II.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Quite apart from the accuracy and merit of its allegations, the complaint as drawn in this case proceeds on the fallacious premise that a craft or class determination by the Board can result in the grievances asserted by appellants to have occurred in this case. The conclusions reached misinterpret the effect of authority exercised by the Board under the Railway Labor Act.

As stated above in the Counterstatement, the provisions of Section 2, Ninth of the Act disclose that the Board's craft or class determination is a preliminary finding made in the process of conducting a representation election and certifying the bargaining representative chosen by the majority of the employees participating in such election. Where dispute exists as to the proper composition of employees forming the particular group known as the craft or class, such a preliminary finding is necessary before the Board can exercise its authority to designate who may participate in an election. But the words of the statute are clear that only upon certification—the Board's "ultimate finding of fact"[23]—is the carrier required to treat with the person or organization so certified as the collective bargaining representative of the craft or class.[24]

No allegation is contained in the complaint that any certification has been issued by the Board or that the appellee unions have been certified to represent the individual appellants. Clearly therefore, as a matter of law, the Board's craft or class determination cannot, as alleged in the complaint, render ineffective any agreement between

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[23] *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 562.

[24] Section 2, Ninth, expressly states: "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

appellee carrier and appellant union, cannot impose any obligation upon a carrier to bargain with a particular representative, cannot compel the individual appellants to be represented by organizations which allegedly deny their membership, and cannot require the carrier to refuse to recognize appellant union or force the carrier to divide its employees among appellee unions.[25] Just as clearly, the Board's craft or class determination cannot, as a matter of law, have the effect attributed to it by appellants of taking away their property rights without due process of law, impairing the obligation of contract guaranteed by the Constitution of the United States, or violating the Fifth Amendment of the Constitution. The claims made by appellants in their complaint and pressed in their brief to this Court result from a misinterpretation of the effect of authority exercised by the Board and the provisions of the statute under which it functions.

For these reasons we submit that the complaint fails to state a claim upon which relief can be granted.

III.

If the Merits of the Case Are Reached, Summary Judgment for Appellees Is Proper

Up to this point we have proceeded on the hypothesis that every allegation of fact contained in the complaint is true and material, and have shown that despite such assumption the complaint should be dismissed. But the facts in this case are not properly represented by the complaint as the affidavits filed by the Government and appellee unions plainly disclose.

It is well established law that where affidavits controvert

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[25] Justiciability, like jurisdiction, should be determined by the allegations of the bill of complaint and not by the way the facts turn out or by a decision on the merits. *Cf. Mosher* v. *City of Phoenix*, 287 U. S. 29, 30; *Iselin* v. *LaCoste*, 147 F. 2d 791, 793 (CCA 5th).

unverified averments in a complaint,[26] there is no genuine issue of material fact and summary judgment is proper. *Battista v. Horten, Myers and Raymond,* 76 App. D. C. 1, 2-3, 128 F. 2d 29, 30-31; *Geller* v. *Trans-America Corp.,* 53 F. Supp. 625, 629 (D. Del.).

The majority of the allegations of the complaint are contradicted by the affidavit of Robert F. Cole, Secretary of the National Mediation Board, filed by the Government in support of its motion for summary judgment (App. 13-61). The contents of this affidavit have been adequately summarized in the Government's brief and need not be repeated here.

The affidavits filed by appellee unions are directed to the allegations in the complaint that colored employees are denied membership in the Brotherhood of Clerks and in IAM. On the contrary, neither union denies membership because or race or color (App. 63, 66, 77). It is true that the Constitution of the Brotherhood of Clerks was recently amended, effective July 1, 1947, to remove all restrictions on membership based on race or color. It is also true, however, that prior to this date the Brotherhood of Clerks had an auxiliary arrangement providing seperate lodges for negro employees, which arrangement was in effect at the time of the hearings by the Board on the craft or class determination in this case (App. 18-19, 63, 64). In any event, even assuming for argument that the alleged exclusion does exist, no guarantees of the Constitution are offended as contended by appellants in their brief. *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 204; *Nat'l Federation of Ry. Workers* v. *National Mediation Board,* 71 App. D. C. 266, 110 F. 2d 529, *cert. den.* 310 U. S. 628. In the last cited case, this Court had before it a contention by the National Federation of Railway Workers that its Constitutional rights were violated through representation of colored

[26] As stated in the Counterstatement, *supra,* the allegations contained in the complaint are unverified (App. 2-6).

coach cleaners by the Brotherhood of Railway Carmen of America, whose constitution and ritual limited colored participation in the Brotherhood to membership in separate lodges through an auxiliary arrangement, identical to that in effect in the Brotherhood of Clerks prior to the aforesaid amendment to its constitution. In answer to this contention, Mr. Justice Vinson, speaking for this Court, said in part (71 App. D. C. 266, 274-275, 110 F. 2d 529, 537, 538):

> "The guarantees of the 14th amendment, U. S. C. A. Const., relate solely to action by a state government, clearly absent here. Hence, any constitutional rights pertinent to the instant case are those guaranteed by the 5th amendment. Decisive of this constitutional issue is the established proposition that the 5th amendment relates only to governmental action, federal in character, not to action by private persons. Corrigan v. Buckley, 271 U. S. 323, 330, 46 S. Ct. 521, 70 L. Ed. 969. Thus the Brotherhood, a private association, acting on its own initiative and expressing its own will, may limit the rights of its colored members, without thereby offending the guarantees of the Constitution. Cf. Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A. L. R. 680.[27]
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> In the last analysis, the Federation's contention reduces itself to the proposition that the members of every race in a craft of workmen have a constitutional right to representation by one of their own race, which neither the majority of the craft nor their own race may take from them. Acceptance of such a principle would certainly destroy the bargaining advantage of the united front secured to employees by the provision of the Act that a majority of any craft shall select the representative for the craft. *The Federation really objects to the principle of majority rule as applied to the selection of the bargaining agency or representa-*

[27] Accord: *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 204, where the Supreme Court held that the Railway Labor Act does not deny a bargaining representative the right to determine eligibility to its membership. Since constitutional rights were asserted in the case, *a fortiori* the Court also held them not to be violated.

tive. It is clear beyond doubt that constitutional objection to majority rule in the selection of an employee bargaining agency cannot prevail.[28] Virginian Ry. Co. v. System Federation, 300 U. S. 515, 516, 548, 57 S. Ct. 592, 81 L. Ed. 789; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. Cf. Grovey v. Townsend, supra." (Italics supplied.)

Insofar as the appellee IAM is concerned, this union has no proper place in this case for any reason. As the Board's affidavit shows, IAM has not been certified to represent any janitors or cleaners (App. 18).

For the foregoing reasons plus those advanced by the Government in its brief in support of the affidavit filed by the Board, it is obvious that there is no genuine issue of material fact in dispute in this case and summary judgment by the District Court was proper, if the action is subject to judicial review.

CONCLUSION

It is respectfully submitted that the District Court's judgment of dismissal on the basis of the motions for summary judgment should be modified to one of dismissal for lack of jurisdiction, or the case remanded with directions to grant the motions to dismiss asserting lack of jurisdiction. Assuming judicial review to be available, the complaint should be dismissed because it fails to state a claim upon which relief can be granted. Further assuming the complaint to be both judicially reviewable and to state a cause

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[28] Appellants' contention that the Board's craft or class determination impairs the obligation of contract guarantee of the Constitution is untenable for several reasons, but assuming, *arguendo*, the Constitutional provision to be at all relevant, the contention in effect is that Sections 2, Fourth and Ninth of the Railway Labor Act are unconstitutional. This Court's decision in the *National Federation of Ry. Workers* case clearly rejects this contention.

of action, summary judgment by the District Court should be affirmed because there is no genuine issue of material fact in dispute and appellees are entitled to judgment as a matter of law.

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SUPPLEMENT

The pertinent provisions of the Railway Labor Act, as amended, 45 U. S. C. § 151 *et seq.*, read as follows:

Section 1 (45 U. S. C. § 151) *Definitions:*

"

* * * *

Sixth. The term 'representative' means any person or persons, labor unions, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

Section 2 (45 U. S. C. § 151a) *General purposes:*

"The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 2 (45 U. S. C. § 152) *General duties — Duty of carriers and employees to settle disputes:*

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* * * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act . . .

* * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance

with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or cœrcion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 201 (45 U. S. C. § 181) *Carriers by Air:*

"All of the provisions of section 1, 2, 4-14 [45 U. S. C. §§ 151, 152, 154-163] of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Section 202 (45 U. S. C. § 182):

"The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 1, 2, and 4-14 [151, 152, 154-163] of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively in section 1."

BRIEF FOR NATIONAL MEDIATION BOARD, APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10010

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, CIO, ET AL., APPELLANTS

v.

NATIONAL MEDIATION BOARD ET AL., APPELLEES

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia
Circuit
FILED NOV 17 1948
Joseph W. Stewart
CLERK

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813326—48——1

The failure of the complaint to allege the Board's certification (App. 59–61) was the basis on which the Board and the other defendants below moved to dismiss the complaint for failure to state a claim upon which relief can be granted.[3] Appellants in their brief to this Court, however, now allege as unlawful the Board's certification as well as its class or craft determination (Appellants' Brief, pp. 6, 11–15).

The Board further moved for dismissal of the action for lack of jurisdiction in the District Court to review the administrative proceedings here involved.

As a third ground of defense, the Board moved for summary judgment.

Although appellants' brief (p. 1) states that the court granted the motions to dismiss as well as the motions for summary judgment, the judgment of the court is limited to the latter motions (App. 78).

In support of its motion for summary judgment, the Board attached an affidavit of Robert F. Cole, Secretary of the National Mediation Board, which controverted the unverified allegations of the complaint[4] and disclosed that there was no genuine issue of a material fact in dispute, thereby entitling defendants to judgment as a matter of law.[5] In view of the many inaccurate and misleading allegations of the complaint, plus the character of the unlawful action asserted, it was deemed advisable to fully acquaint the District Court with the exact facts by way of affidavit, even though it was, and is now, the Government's contention that the court had no jurisdiction to

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[3] The argument in support of this position is set forth *infra*, pp. 6–9.

[4] Appellants assert in their brief (pp. 2, 3) that the complaint was supported by affidavit. No affidavit was filed with the complaint (App. 2–6). After briefs had been submitted and oral argument had in the District Court, appellants' counsel submitted an affidavit executed by himself in opposition to the defendants' motions to dismiss and motions for summary judgment. The Board moved that this affidavit be stricken or disregarded by the court on the ground that it was not a statement of fact by a competent witness having personal knowledge thereof but was made by counsel upon information and belief (App. 75). Apparently the court so regarded it.

[5] There is no genuine issue of material fact where affidavits controvert unverified averments in a complaint, and summary judgment is proper. *Battista* v. *Horten, Myers & Raymond*, 128 F. 2d 29, 30–31; *Gifford* v. *Travelers Protective Ass'n of America*, 153 F. 2d 209, 210–211; *Lewis* v. *Atlas Corp. et al.*, 158 F. 2d 599, 600–601.

review the administrative proceedings alleged as unlawful. In this connection, a word of explanation to this Court seems desirable.

The complaint makes no mention of the fact that the Board, in recognition of the fact that appellant union [6] had not had an opportunity to be heard at the hearing conducted by the Board in November 1946, afforded it an opportunity to appear and present its contentions at a subsequent hearing held on April 21, 1947, for the purpose, among others, of considering the craft or class question as it applied to employees then represented by UTSEA with Pennsylvania Central Airlines [7] (App. 16, 46–47).

The complaint likewise fails to mention the fact that UTSEA did appear at said hearing through its counsel and presented its views in opposition to the Board's determination of the proper craft or class grouping of employees (App. 16, 49). The complaint also omits mention of the fact that prior to such hearing, UTSEA was forwarded copies of the notice of the representation election scheduled by the Board, had its name carried in printed form on the ballot used in the election, was notified of employees eligible to participate in said election, was afforded an opportunity to have an observer present at the polls during the election as well as an observer present when the ballots were counted on May 7, 1947, and had ballots cast by employees seeking it as a bargaining representative (App. 16–17).[8]

Moreover, the complaint erroneously alleges that the Board's craft or class determination includes all janitor employees of the carrier, and divides all such employees among the appellee unions. The Board's craft or class determination includes janitors and cleaners who work in and around offices and office buildings (App. 46–47), but does not include such employees who work in and around the carrier's hangars and repair or maintenance shops. UTSEA was so notified by the Board prior to the hearing in which it participated (App. 18, 43). Furthermore, the Board's last certification to the International Asso-

[6] Hereafter sometimes referred to as UTSEA.

[7] Hereafter referred to as the "carrier."

[8] Compare the statement in appellants' brief (p. 8) that the Board held the election "without notice to UTSEA-CIO," and accorded appellants a hearing *after* the results of the election were known.

ciation of Machinists issued on February 26, 1946, expressly excludes hangar cleaners and janitors from the group of employees represented (App. 18, 60), thereby permitting UTSEA's continued representation of such employees.[9]

Further, the complaint fails to disclose that the Board's determination of a craft or class is by statute, and was in this proceeding, simply an intermediate step in the process of conducting a representation election and certifying the party or organization receiving the majority of the votes cast as the bargaining representative. Specifically it is a preliminary required whenever dispute exists as to the proper grouping of employees entitled to vote as a unit, which the Board is expressly directed by Section 2, Ninth, of the Railway Labor Act to determine. The complaint fails to disclose that in the administrative proceedings here pertinent the craft or class determination was followed by an election among all of the employees of the craft or class (including the janitors and cleaners), following which a bargaining representative, chosen by the majority of the craft or class, was certified by the Board as directed by the statute.

Each of the foregoing facts is supported by affidavit as shown by the above citations to the Joint Appendix, and stands uncontradicted on the record.

STATUTE INVOLVED

The statute involved is the Railway Labor Act, as amended in 1934 and 1936 (45 U. S. C. § 151 *et seq.*). The provisions of the Act here relevant are set forth in the supplement to this brief.

SUMMARY OF ARGUMENT

1. The complaint fails to state a claim upon which relief can be granted. Section 2 Ninth of the Railway Labor Act requires that the functions and duties of the Board in representation disputes shall be (1) to investigate, (2) to designate who may participate in elections, and (3) to certify the name of the designated and authorized representative for collective bargaining purposes. The complaint herein seeks to set aside

[9] Compare appellants' statement in its brief at p. 6, paragraph numbered "3".

and vacate "a determination of craft or class" issued by the Board which is an intermediate step in the process of certifying a collective bargaining representative and nowhere in the complaint does appellant allege the Board's certification was the basis of the unlawful action. These provisions of Section 2 Ninth of the Railway Labor Act clearly show that a class or craft determination cannot result in the grievances alleged in the complaint, and that only the Board's certification can change any preexisting rights of the employees or their representatives or create a duty upon the carrier to bargain collectively with any particular representative.

2. There was no jurisdiction in the district court to review the subject matter of the complaint. It is well settled that proceedings of the Board pursuant to Section 2, Ninth, of the Railway Labor Act are not judicially reviewable. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297; *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Brotherhood of Railway Clerks* v. *United Transport Service Employees*, 320 U. S. 715, 816. *United Transport Service Employees of America* v. *Mediation Board*, 141 F. 2d 724; *National Fed. of Ry. Workers* v. *Mediation Board*, 141 F. 2d 725; *Kirkland* v. *Atlantic Coast Line R. R. Co., Mediation Board, et al.*, 167 F. 2d 529, *Cert. Den.*, 17 Law Week 3112, Oct. 19, 1948. The foregoing would seem conclusive on the question of jurisdiction to review the action here presented. Appellants sole reliance in opposition to this well settled law is predicated on two decisions by the Supreme Court following the decisions in the *Switchmen's* case. These two decisions, are *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 191 and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. Appellants maintain in their brief that by these cases the Supreme Court either overruled or modified its ruling in the *Switchmen's* case where a problem such as that presented by the present action is concerned. These two decisions not only do not support appellants contention but they more clearly affirm the ruling in the *Switchmen's* case. The case should have been dismissed for lack of jurisdiction and this court should affirm judgment of dismissal on that basis rather than on the basis of summary judgment.

3. Assuming, arguendo, the administrative action here involved to be judicially reviewable, the summary judgment of the District Court was proper and should be affirmed. The affidavit filed by the Secretary of the Board, Robert F. Cole, which is supported by exhibits, recites the material facts concerning the controversy here in issue. These facts clearly show that the Board's action was lawful in all respects and that the allegations of illegality contained in the complaint are without foundation. It is well established that where affidavits controvert unverified averments in a complaint, there is no genuine issue of material fact and summary judgment is proper. *Battista* v. *Horten, Myers and Raymond,* 128 F. 2d 29, 30–31 (App. D. C.); *Gifford* v. *Travelers Protective Ass'n of America,* 153 F. 2d 209, 210–211; *Lewis* v. *Atlas Corp. et al.,* 158 F. 2d 599, 600–601. Appellants contend in their complaint that the Board's class or craft determination changed the contract then existing between the carrier and U.T.S.E.A., and that the constitutional guarantee against impairment of the obligation of contract thus has been violated by the Board. The carrier is obligated by statute to recognize the Brotherhood of Railway and Steamship Clerks as the bargaining agent for the janitors and cleaners rather than appelants' union because the majority of the craft or class to which these employees' belong at an election chose the Brotherhood of Railway and Steamship Clerks rather than appellants' union. To claim under such circumstances that the refusal of the carrier to recognize appellants' union impairs the obligation of contract contrary to the constitution is to assert that Section 2, Ninth, of the Railway Labor Act is unconstitutional and this attack has already been denied by this Court in *National Federation of Railway Workers* v. *National Mediation Board,* 110 F. 2d 529, 537–538, cert. den. 310 U. S. 628.

ARGUMENT

I

The complaint fails to state a claim upon which relief can be granted

The Railway Labor Act provides that employees shall have the right to organize and bargain collectively through repre-

sentatives of their own choosing, and that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of the Act (45 U. S. C., § 152, Fourth). The Act contains no definition of the phrase "craft or class," but Section 2, Ninth, provides the method by which disputes may be settled among the employees of carriers as to who are its representatives in the following language:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary

> by it to carry out the purposes and provisions of this paragraph (45 U. S. C., § 152, Ninth).

It will be noted from the foregoing section of the Act that the functions and duties of the Board in representation disputes generally may be stated to be (1) to investigate, (2) to designate who may participate in elections, and (3) to certify the name of the designated and authorized representative. The effect of the authority conferred upon the Board to designate who may participate in an election is to give the Board the right to select the groups of which a majority may select a representative, therefore the right to determine the scope of the crafts or classes to which employees should be grouped for collective bargaining purposes.

It is clear, however, that the determination of a craft or class is only an intermediate step in the process of selecting the duly designated and authorized representative. It is merely a finding as to the identity of the employees who may participate in the selection of a representative for a particular group. It does not confer any representation rights upon any representative, nor does it impose any obligation upon a carrier to treat with any particular representative.

The provisions of Section 2, Ninth, clearly show that it is the third step in the Board's process, and only the third, which by Board action could change any preexisting rights of employees or their representatives, or create a duty upon a carrier to bargain collectively with any particular representative. It is only when the Board certifies to the parties the name or names of representatives who have been designated and authorized to represent employees involved in a dispute, that any act of the Board could create legal obligations to bargain collectively with respect to particular employees or the representatives of such employees.

Appellants' entire claim in this case is predicated upon a craft or class determination by the Board which it made as a preliminary finding in a representation dispute. No allegation is contained in the complaint that any certification has been issued by the Board, or that the appellee unions have been certified to represent the individual appellants. As far as appears

from the complaint the Board may never have issued a certification.

Since it is clear that the certification alone entitles the party certified to representation rights and requires the carrier to treat with such representative, the Board's craft or class determination clearly cannot have the effect ascribed to it in the complaint.

For the foregoing reasons the Board submits that the complaint fails to state a claim upon which relief can be granted.

II

Administrative proceedings of the mediation board under Section 2, Ninth, of the Railway Labor Act are not subject to judicial review

As its second and principal ground for dismissal of the complaint, the Board contends that the District Court lacked jurisdiction over the subject matter of this complaint, whether the action of the Board is restricted to the determination of which appellants complain or is viewed in its proper setting as shown by the affidavit attached to the Board's motion for summary judgment.

It is well settled that proceedings of the Board pursuant to Section 2, Ninth, of the Railway Labor Act are not judicially reviewable. *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323; *Brotherhood of Railway Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816.

In the *Switchmen's* and *General Committee* cases the Supreme Court reviewed in considerable detail the provisions and legislative history of the Railway Labor Act, and reached the conclusion that proceedings under Section 2, Ninth, were not subject to judicial review.

In the *Switchmen's* case, the Court was asked to review a finding of the Board, issued under Section 2, Ninth, of the Act, that the craft or class of employees known as yardmen included all yardmen in the employ of the New York Central Railroad over its entire system. The contention was advanced

that this finding violated the provisions of Section 2, Fourth, of the Act safeguarding the rights of employees on the western segment of the New York Central to choose their own representative for collective bargaining. The Court did not reach the merits of the case but dismissed the action on the ground that there was no jurisdiction to review certifications of collective bargaining representatives under the Railway Labor Act. In discussing its reason for denying judicial review the Court stated in part:

> The Act in § 2, Fourth, writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for purposes of this Act." That "right" is protected by § 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F. 2d 757; *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 135 F. 2d 780. A review by the federal district courts *of the Board's determination* is not necessary to preserve or protect that "right." [10]
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> * * * * *
>
> When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in the light of that history supports the view that Congress gave *administrative action under Section 2, Ninth,* a finality which it denied administrative action under the other sections of the Act.[11]
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> * * * * *

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[10] 320 U. S. 297, 300–301. [Emphasis ours.]

[11] *Id.* at 306. [Emphasis ours.]

> While the Mediation Board is given specified powers in the conduct of elections, *there is no requirement as to hearings* * * *. The Mediation Board makes no "order." And its only ultimate finding of fact is the certificate. *Virginian Ry. Co.* v. *System Federation, supra,* p. 562 [300 U. S. 515]. The function of the Board under § 2, Ninth, is more the function of a referee.[12]
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> * * * * * *
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> * * * Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease * * * the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.[13]

In the face of the foregoing we fail to see how it can be seriously urged that the court has jurisdiction to review the present action. The attempt here made is to secure judicial review of an "aspect of the problem" of certifying a collective bargaining representative, namely the Board's craft or class determination, a preliminary step in the procedure provided by Section 2, Ninth, of the Act. But, as quoted above, the Supreme Court has expressly labeled such a determination as not judicially reviewable.

The law announced by the *Switchmen's* decision has been consistently adhered to by the Supreme Court[14] and uniformly

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[12] *Id.* at 304. [Emphasis ours.]

[13] *Id.* at 305.

[14] *Brotherhood of Railway Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816; *Kirkland* v. *Atlantic Coast Line R. R. Co.,* 167 F. 2d 529 (App. D. C., 1948), *cert. den.* 17 Law Week 3112, Oct. 19, 1948. In other cases the Court has made reference to its decision in the *Switchmen's* case and carefully distinguished the questions presented from those which do not arise out of the administrative action of the Board pursuant to Section 2, Ninth, of the Act. *Order of Conductors* v. *Swan,* 329 U. S. 520, 524; *Steele* v. *L. & N. R. Co.,* 323 U. S. 192, 205, 207; *Tunstall* v. *Brotherhood,* 323 U. S. 210, 213; *Order of Conductors* v. *Pitney,* 326 U. S. 561, 566; *Order of Conductors* v. *Penn. R. Co.,* 323 U. S. 170, 172; *Stark* v. *Wickard,* 321 U. S. 288, 303.

applied by this Court. *United Transport Service Employees of America* v. *Mediation Board*, 141 F. 2d 724; *Natl. Fed. of Ry. Workers* v. *Mediation Board*, 141 F. 2d 725; *Kirkland* v. *Atlantic Coast Line R. R. Co., Mediation Board, et al.*, 167 F. 2d 529, *cert. den.* (17 Law Week 3112, Oct. 19, 1948).

In the last cited case this Court had occasion to rely upon the holding of the *Switchmen's* case in affirming a judgment of the District Court that the Administrative Procedure Act did not provide judicial review for administrative proceedings of the Board under Section 2, Ninth, of the Railway Labor Act.

The foregoing would seem conclusive on the question of jurisdiction to review the action here presented. Appellants' sole reliance in opposition to this well-settled law is predicated on two decisions by the Supreme Court following its decision in the *Switchmen's* case. These two decisions are *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 191 and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. Appellants maintain in their brief that by these cases the Supreme Court either overruled or modified its ruling in the *Switchmen's* case where a problem such as that presented by the present action is concerned.[15] On the contrary, these cases not only do not support appellants' contention but they more clearly affirm the ruling of the *Switchmen's* case.

In the *Steele* case, the Brotherhood of Locomotive Firemen and Enginemen was the duly selected and authorized collective bargaining representative of all of the firemen employed by the Louisville & Nashville Railroad, including both white and colored firemen. A majority of the firemen were white and a substantial minority were *negroes* who by the constitution and ritual of the Brotherhood were excluded from membership. The Brotherhood entered into a collective-bargaining agreement with the carrier under the terms of which negro firemen who were members of the craft or class represented by the Brotherhood were deprived of the opportunity to work on jobs to which they were entitled by seniority and for which they were qualified. As a consequence the negro employees

[15] Appellants' brief, pp. 10–11, 16–18.

of the craft were deprived of employment during certain periods, and at other times were assigned to longer, more arduous and less remunerative work than the white firemen.

In asserting judicial power to remedy such a situation, the Supreme Court carefully pointed out that the question presented did not concern an administrative determination of the Mediation Board under Section 2, Ninth, but involved the statutory responsibility of the certified bargaining representative to fairly represent all of the employees in the craft or class without hostile discrimination because of race or color. In this connection the Court stated:

> The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, *cf. Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.,* 320 U. S. 323; *General Committee v. Southern Pacific Co.,* 320 U. S. 338; *Brotherhood of Clerks* v. *United Transport Service Employees,* 320 U. S. 715, 816; or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration. *General Committee* v. *M.-K.-T. R. Co., supra,* 332, 337. There is no question here of who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board, *Switchmen's Union* v. *National Mediation Board, supra, General Committee* v. *M.-K.-T. R. Co., supra.*[16]
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> * * * * *
>
> In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have juris-

[16] 323 U. S. 192, 204–205.

diction. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300.[17]

* * * * *

In other words, the Court in assuming jurisdiction to remedy a breach of a statutory obligation by a bargaining representative just as clearly reaffirms its lack of jurisdiction to judicially review the administrative proceedings of the Board which resulted in certification of the bargaining representative.

This line of demarcation is pointedly emphasized in other portions of the Court's opinion. For example it states:

> There is no administrative means by which negro firemen can secure separate representation for purposes of collection bargaining. The Mediation Board has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives.[18]
>
> While the statute does not deny to such a bargaining representative the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.[19]

Obviously, the Court's observations in the *Steele* case not only do not support appellants' interpretation of the decision but expressly refute such interpretation. There is no allegation in this complaint that appellee unions have breached their statutory duty to represent nonunion or minority members of the crafts for which they are certified without hostile discrimination, "fairly, impartially, and in good faith." There is no allegation whatever concerning the conduct of appellee unions in their representative capacity. In fact, there is no allegation that appellee unions have been certified to represent the crafts to which the individual appellants belong. The object of the action here instituted is to obtain judicial review of administrative action of the Board under Section 2, Ninth, of

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[17] *Id.* at 207.

[18] 323 U. S. 192, 206–207.

[19] *Id.* at 204.

the Railway Labor Act, which the *Steele* case, equally if not more emphatically than the *Switchmen's* case, holds to be not judicially reviewable.

The *Tunstall* case [20] does not require separate discussion because it was a companion case to the *Steele* case decided upon the same grounds.

Clearly, the present action was not subject to jurisdiction by the District Court. We respectfully submit that the case should have been dismissed for lack of jurisdiction and that this Court should direct such dismissal.

III

If judicial review were available, summary judgment by the District Court was proper and should be affirmed

Assuming, *arguendo,* the administrative action here involved to be judicially reviewable, the summary judgment of the District Court was proper and should be affirmed. A comparison of the facts alleged in the complaint and those disclosed by the Cole affidavit, attached to the Board's motion for summary judgment, clearly shows that no genuine issue of a material fact is in dispute in this case and that appellees are entitled to judgment as a matter of law.

The affidavit filed by the Secretary of the Board, Robert F. Cole, which is supported by exhibits, recites the material facts concerning the controversy here in issue (App. 13–61). These facts clearly show that the Board's action was lawful in all respects and that the allegations of illegality contained in the complaint are without foundation. It is well established that where affidavits controvert unverified averments in a complaint, there is no genuine issue of material fact and summary judgment is proper. *Battista* v. *Horten, Myers & Raymond,* 128 F. 2d 29, 30–31 (App. D. C.); *Gifford* v. *Travelers Protective Ass'n. of America,* 153 F. 2d 209, 210–211; *Lewis* v. *Atlas Corp. et al.,* 158 F. 2d 599, 600–601.

The affidavit discloses the following facts: As a result of a representation dispute among clerical and office employees of Pennsylvania Central Airlines, the Board's services were in-

[20] Cited *supra.*

voked under Section 2, Ninth, of the Railway Labor Act to investigate the dispute (App. 13). Disagreement developed over the proper grouping of the employees as a result of which the Board held a public hearing (App. 13–14). Based upon the evidence adduced before the Board at this hearing, it issued a determination which grouped certain employees as constituting the craft or class of "clerical, office, stores, freight and passenger service employees." Included within such craft or class were the janitors and cleaners in and around the carrier's offices and office buildings (App. 14).

In holding the hearing prior to its craft or class determination, the Board had overlooked the fact that 8 of the total number of 1,749 employees involved were represented by appellant union, as a result of which such union was not notified of the hearing before the Board (App. 14–15). However, the Board took steps to assure an opportunity for appellant union to present its views by scheduling a second hearing at which other contentions in opposition to the Board's craft or class determination were also to be heard and considered (App. 15).

In the meantime, the Board had conducted an election among the employees of the craft or class as determined (including the janitors and cleaners in and around the offices and office buildings) for the purpose of designating a bargaining representative selected by the majority of the craft (App. 16–17). Appellant union was notified in advance that the election would be held, had its name carried in printed form on the ballot used in the election, was notified of employees eligible to participate in the election, and was afforded an opportunity to have an observer present at the polls during the election as well as an observer present when the ballots were counted. In fact, ballots were cast by employees seeking appellant union as its bargaining representative (App. 17). To protect the interest of appellant union in the dispute, the ballots were impounded pending final determination by the Board after the second hearing as to who were properly members of the craft and thus entitled to vote (App. 17).

Appellant union was duly notified of the second hearing, appeared, and was heard with respect to its opposition to the

Board's inclusion of the janitors and cleaners within the clerical and office workers craft or class (App. 16, 49).

After the second hearing, a second determination of craft or class was issued by the Board on April 25, 1947 (App. 45), which affirmed among other findings its previous determination with respect to the inclusion of the janitors and cleaners in and around offices and office buildings (App. 49–50). Thereupon, the Board directed that the impounded ballots be counted, the results of the election were determined, and the Board certified the Brotherhood of Clerks as the duly designated bargaining representative of the craft or class of which the individual appellants here are a part (App. 50, 57, 58). All parties concerned were so notified (App. 58–59).

The affidavit further shows that the janitors and cleaners *in and around the hangars and repair and maintenance shops* were not affected by the Board's certification (App. 18).[21] Accordingly, contrary to the allegations of the complaint, appellant union is still free to represent such employes, and the International Association of Machinists has not been certified to do so (App. 18).

It is at once apparent that the complaint is a mixture of erroneous factual allegations, partially true statements, and untenable conclusions of law which cannot be substantiated. For example, the allegation that the Board's determination of craft or class on January 31, 1947, was made without notice to appellants is true so far as it goes. The trouble is that it does not go far enough. Even though under the Act the Board is not required to hold hearings,[22] it took pains in the case at hand to correct its oversight in not notifying appellant union at the time of the first hearing and held a second hearing at which time appellant union appeared and was heard and had full opportunity to present any views for consideration by the Board. The fact that appellant union's views did not prevail does not detract from the solicitude of the Board in entertaining them. In fact, from the moment it discovered that appellant union had been overlooked, the Board, as indicated above,

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[21] The Board so notified appellant union prior to the hearing in which it participated (App. 43).

[22] *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 304.

made every effort to afford appellant union full information and every facility and opportunity to present its views and protect its interests (App. 15).

The allegation in the complaint that the Board's craft or class determination compels the individual appellants without their consent to be represented by organizations which deny them membership has already been shown in part I of this brief to be legally unsound. It is also without foundation in fact in the light of the affidavits filed by appellee unions in this case which expressly contradict the allegation that appellee unions deny negroes membership (App. 63–64, 66, 77–78). In any event, exclusion cannot be attributed to any action of the Board.[23]

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[23] In *National Federation of Ry. Workers* v. *National Mediation Board*, 110 F. 2d 529, *cert. den.* 310 U. S. 628, this Court had before it a contention identical to that advanced in the instant case, namely that certain rules of the Brotherhood of Railway Carmen of America so proscribed the role negroes could play in that organization that representation by it of colored coach cleaners would deprive such employees of constitutional rights. In deciding against such contention, this Court said *inter alia* (pp. 537–538).

"The only governmental action in respect to the instant case consisted in the enactment of the Railway Labor Act and the functioning of the Board thereunder. Section 2 of the Act provides that the 'majority of any craft * * * shall have the right to determine who shall be the representative of the craft * * *', and the Board is authorized to conduct elections to determine such representative. The term 'representative', as found in the act, is defined to mean 'any person or persons, labor union, organization, or corporation designated * * * by * * * employees, to act for * * * them.'

"Thus, under the Act, employees are guaranteed the right to select a common bargaining representative and that representative may be a person of any race or color (or an association made up of persons of any race or color). The quality of opportunity thus guaranteed is the complete antithesis of discrimination. To hold that colored employees could be represented only by colored persons for bargaining purposes would be to introduce into the administration of the Act the very discrimination which the Federation seeks to avoid.

"In the election at hand a craft of 86 coach cleaners, 70 of whom were colored, by a vote of 42 to 35 chose as their collective bargaining agent or representative the Brotherhood of Railway Carmen. It may be that certification of the Brotherhood will mean that white, rather than colored, men will represent the coach cleaners in negotiation with the carrier. If so, that condition will obtain because a majority of the coach cleaners voted for it, *and not by reason of any governmental action.*" [Emphasis supplied.]

The allegation that the Board's craft or class determination required appellee carrier to improperly divide its employees among the appellee unions is equally without foundation. In the first place, for the reason set forth in part I of this brief, a craft or class determination by the Mediation Board cannot produce such a result as a matter of law. In the second place, as the affidavit demonstrates, the International Association of Machinists, one of the two appellee unions alleged to have benefited from the asserted division, has not been certified to represent the janitors and cleaners. In the third place, it is not through any order or command of the Board that the carrier is required to recognize the Clerks' Union as the bargaining representative for the janitors and cleaners who work in and around the offices and office buildings, but the command of the statute.[24]

Finally, the allegation that the carrier is required to refuse to recognize appellant union is true in part and partly false. Once again, as explained above, the Board cannot require recognition or nonrecognition of any union. Moreover, insofar as the janitors and cleaners who work in and around hangars and repair shops are concerned, the allegation has already been shown to be in error because such employees are not covered by the Board's determination assailed in this action.

The legal conclusion voiced by appellants that the constitutional guarantee against impairment of the obligation of contract has been violated by the Board's action in this case is so obviously in error as to warrant little comment. The reason that the carrier is obligated by statute to recognize the Brotherhood of Clerks as the bargaining representative for the janitors and cleaners in and around the offices and office buildings rather than appellant union is only because the majority of the craft or class to which these employees belong elected the Brotherhood of Clerks and not appellant union. The claim that under such circumstances the refusal of the carrier to recognize appellant union impairs the obligation of contract contrary to the

[24] The Supreme Court has clearly pointed out that the Board's certification is not an order but a finding of fact not enforceable by it, and its function is described as that of a referee. *Switchmen's Union* v. *Board*, 320 U. S. 297, 304–305.

Constitution is to assert that Section 2, Ninth of the Railway Labor Act is unconstitutional. That claim has already been set at rest by this Court in *National Federation of Ry. Workers v. National Mediation Board*, 110 F. 2d 529, 537–538, *cert. den.*, 310 U. S. 628.

It is thus clear from the affidavits set forth in the record that no genuine issue of material fact is in dispute. In a word, appellants' case reduces itself to an attempt to have the court set aside the Board's action as unlawful because the Board refused to recognize the janitors and cleaners as constituting a separate craft entitled to separate representation because they are colored. But as the Supreme Court pointed out in its decision in the *Steele* case (323 U. S. 192, 206): "The Mediation Board 'has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives.'" And this Court prior to the *Steele* decision, also considered such a contention for separate representation in the *National Federation of Ry. Workers* case, *supra*, and likewise decided adversely to it, observing that "To hold that colored employees could be represented only by colored persons for bargaining purposes would be to introduce into the administration of the Act the very discrimination which the Federation seeks to avoid."

In addition to the foregoing, the type of review requested by the complaint is clearly contrary to well established law. Appellants call upon this Court to direct the District Court to issue a mandatory injunction requiring the reinstatement of the bargaining agreement entered into between appellant union and the carrier on July 17, 1945, and an injunction to restrain appellee unions from acting as the bargaining representatives for the individual appellants. In order to grant such relief the court would either have to find that the Board had no authority under law to certify appellee unions as the duly designated and authorized agents of the crafts or classes they represent, or it would have to set aside the Board's findings of fact [25] on the ground that they were not supported by sub-

[25] The Board's findings of fact in this case are set forth in its two determinations issued on January 31, 1947, and April 25, 1947, which are attached as exhibits to the affidavit filed in support of the Board's motion for summary judgment (App. 21, 45).

stantial evidence. In cases involving determinations of the Mediation Board decided prior to the Supreme Court's jurisdictional holding in the *Switchmen's* case, this Court uniformly held that the Board's findings and conclusions when supported by substantial evidence may not be disturbed by the courts. *National Federation of Ry. Workers* v. *National Mediation Board,* 110 F. 2d 529, 533; *Order of Ry. Conductors* v. *National Mediation Board,* 113 F. 2d 531, 532. The complaint filed in this case makes no allegation that the findings of the Board are not supported by substantial evidence. Assuming, *arguendo,* that the complaint contains allegations raising issues of fact, if appellants were permitted to go to trial on such issues of fact and introduce evidence seeking to contradict the findings of the Board, the court could not "bring it into hotchpot" with the evidence taken by the Board without deciding the issues in the first instance itself. That courts will not undertake to do this is well established. The exercise of such power would upset the whole underlying scheme of an administrative board whose informed judgment must stand or fall upon such evidence as it had before it. If an aggrieved party wishes to supplement that evidence, he must apply to the Board itself. Appellants had such an opportunity in this case. Thus the only issue of fact, assuming it can be called such, is whether there was evidence to support the Board's findings. *National Broadcasting Co.* v. *United States,* 47 F. Supp. 947 (S. D. N. Y.), aff'd 319 U. S. 190, 227.[26]

Actually, however, no issues of material fact are in dispute in this case in the light of the affidavits filed which controvert the unverified allegations of the complaint. Thus the complaint is reduced to a claim for relief based on the assertion that the Board's craft or class determination violates appellants' statutory and constitutional rights. Such contention has been shown to be legally unsound.

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[26] In the cited case Judge Learned Hand stressed the permissible scope of review of action of an administrative body in a case involving the use by defendants of a motion for summary judgment accompanied by affidavits. See also *Taylor* v. *Latimer,* 47 F. Supp. 236 (W. D. Mo.).

Under the circumstances of the case as here presented, summary judgment by the District Court was proper assuming that the lower court had jurisdiction to entertain the action.

CONCLUSION

For the reasons advanced in part II of this brief, we submit that the action should be dismissed because the District Court lacked jurisdiction over the subject matter of the complaint. Assuming that the court possessed the necessary jurisdiction, the complaint fails to state a cause of action and should be dismissed on this additional basis. If the case is reached on the merits the affidavits filed herein by appellees clearly disclose that summary judgment by the District Court should be affirmed.

Respectfully submitted.

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SUPPLEMENT

The pertinent provisions of the Railway Labor Act, as amended, 45 U. S. C. § 151 *et seq.*, read as follows:

Section 1 (45 U. S. C. § 151). *Definitions:*

"* * *

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

Section 2 (45 U. S. C. § 151a). *General purposes:*

"The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 2 (45 U. S. C. § 152). *General duties—Duty of carriers and employees to settle disputes:*

"* * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act * * *

* * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 201 (45 U. S. C. § 181). *Carriers by Air:*

"All of the provisions of section 1, 2, 4–14 [45 U. S. C. §§ 151, 152, 154–163] of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who

performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."

Section 202 (45 U. S. C. § 182):

"The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 1, 2 and 4–14 [151, 152, 154–163] of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively in section 1."

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